Supreme Court of the United States

OCTOBER TERM, 1951

No. 522

JOSEPH BURSTYN, INC.,
Appellant,
against
LEWIS A. WILSON, Commissioner of Education of the State of New York, *et al.*

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN JEWISH CONGRESS, AS *AMICI CURIAE*

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Statement of Facts

The motion picture film "The Miracle" was twice granted a license for public exhibition in New York, first as a single feature, and again as a part of the trilogy entitled "Ways of Love," which won the New York Film Critics Award as the best foreign picture of 1950.*

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* The New York Board of Regents has more recently banned the film "La Ronde," which won the British Film Academy Award for the best picture of 1951, and which has played in the District of Columbia and Los Angeles, without incident. New York Herald Tribune, Feb. 20, 1952, p. 17, col. 2. Even more recently, it banned as "indecent" a documentary film, "Latuko," sponsored by the American Museum of Natural History, which played previously in Hollywood, Los Angeles, Memphis, and Salt Lake City among others, apparently without any prosecutions for obscenity ever having been

The Board of Regents of the University of the State of New York, on February 16, 1951, almost two years after the first license was issued, rescinded and cancelled the licenses on the ground that the film was sacrilegious. This proceeding, an application for an order against respondents pursuant to Article 78 of the New York Civil Practice Act, and for an order enjoining respondents from cancellation of the licenses, resulted in the confirmation of the action of the Board by the Appellate Division of the New York Supreme Court, Third Department. This appeal is from the 5-2 affirmance of that decision by the New York Court of Appeals.

Interest of *Amici*

This brief *amici curiae* is submitted pursuant to consent of the parties. The American Civil Liberties Union, which has constantly striven for defense of the Bill of Rights of the United States Constitution, files this brief solely because it believes that civil liberties have been violated by the decision below. The American Jewish Congress is a national charitable, educational and religious association of American Jews which was organized "* * * to help secure * * * and to safeguard the civil, political, economic and religious rights of Jews everywhere" and "* * * to help preserve, maintain and extend the democratic way of life." We regard the principle of separation of church and state as one of the foundations of American democracy. Both political

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brought against it. New York Times, March 29, 1952, p. 17, col. 8. For other examples of film censorship, see, in addition to the annual reports of the American Civil Liberties Union, *What Shocked the Censors*, published by the ACLU's National Council on Freedom from Censorship; *What Censorship Keeps You From Knowing*, Redbook Magazine, July 1951, pp. 24 ff.; Levy, *The Case Against Film Censorship*, Films In Review, Vol. I, No. 3, pp. 1 ff. (April 1950).

liberty and freedom of religious worship and belief, we are convinced, can remain inviolate only when there exists no intrusion of secular authority in religious affairs or of religious authority in secular affairs. We believe that the suppression of this film by State intervention threatens the integrity of secular institutions and endangers the private right of the creative artist as well as all other individuals to deal with matters of philosophic and artistic importance.

We take no position on the question of whether or not this film is sacrilegious or indeed deeply religious. Notable commentators, including many reputable clergymen as well as film art critics, have taken different views on this question (see Appellant's Brief, pp. 5-7). We are interested primarily in these two points: 1) That censorship of motion pictures prior to exhibition is in violation of the Fourteenth Amendment to the United States Constitution because it violates freedom of expression; and 2) that making the issuance or revocation of a license depend upon whether or not a film is found by a governmental body to be sacrilegious, is a violation of the Fourteenth Amendment to the United States Constitution because it is encroachment of the state in matters of religion and because the terms of reference are too vague.

POINT I

To serve the ends of freedom of speech, motion pictures must receive its protection. The case of *Mutual Film Corp.* v. *Ohio Industrial Commission*, 236 U. S. 230 (1915), cannot now prevent the vindication of the principles of the free press.

It is our position that what authority the *Mutual Film* case may once have had has been so impaired by subsequent decisions of this Court that this Court should undertake its re-examination, lay the ghost of that precedent, and vindicate the fundamental constitutional principle that every vehicle of ideas is shielded from such censorship as was imposed in the instant case. Kupferman & O'Brien, *Motion Picture Censorship*, 36 Cornell Law Quart. 273; Note, *Motion Pictures and the First Amendment*, 60 Yale L. J. 696-719.

A. Only after the *Mutual Film* case was it held that the First Amendment, via the Fourteenth, protects speech from state action.

Only one free speech case had been decided by this Court (*Davis* v. *Massachusetts*, 167 U. S. 43 (1897)) before it decided the *Mutual Film* case. Ten years after its decision, a specific infirmity of that case became apparent when this Court, in its opinion in *Gitlow* v. *New York*, 268 U. S. 652 (1925) recognized for the first time "in the Fourteenth Amendment the application to the states of the same standards of freedom of expression as, under the First Amendment, are applicable to the federal government." *Bridges* v. *California*, 314 U. S. 252, 267-268 (1941). Thus, though there may have been reasons, now no longer valid, for the Supreme Court decision in 1914 that motion pictures were not part of the "press," it is

also certain, as indeed the Court's opinion in the *Mutual Film* case explicitly shows, that a state's power to censor the "press" was there measured not against the First Amendment but only against that state's own constitutional provisions.

This Court itself, following the *Gitlow* decision and the experience of the subsequent cases in which it was called upon to measure against the First Amendment many forms of censorship established by state and municipal authority, has deprived the *Mutual Film* case of its last vestige of substance by its dictum in *United States* v. *Paramount Pictures*, 334 U. S. 131, 166 (1948). There Mr. Justice Douglas, in an opinion concurred in by all but two of the members of the Court, said:

> "We have no doubt that moving pictures, like newspapers and radio are included in the press whose freedom is guaranteed by the First Amendment."

This Court should, therefore, now explicitly overrule the *Mutual Film* case.

B. Even if movies were mere entertainment, they would still be protected by the First Amendment. But they are not now mere entertainment.

The *Mutual Film* case was brought and decided in the infancy of motion pictures when the potentialities of the medium as a means of communication and a form of art were necessarily as yet unrealized. That case represented a general attack *in vacuo* upon the first groping exercise of an assumed state power to regulate a novelty. Pictures were still silent then.

In the subsequent thirty-seven years, however, the law of the First Amendment has undergone constant refinement. The principle of the free press itself has received

careful judicial scrutiny to the end that its purpose may be served more adequately.

Meanwhile, the potentialities of motion pictures for the dramatic presentation of ideas have been both realized and further developed. Today, at least 25% of motion pictures have ideational content (see *infra*, pp. 14-15). A decision rendered in a case brought (1913) before even one feature film or "talkie" had been exhibited in this country can hardly be considered binding in face of the nature and content of the modern film. The relation that the motion picture of 1913 bears to the present film is simply one of ancestry. The doctrine of "stare decisis" should hardly be applied to either modern films or modern man because of an earlier ruling on lineal forebears. The instant case, accordingly, presents a concrete example of the operation of censorship that could hardly have been presented to this Court in 1915.

When in that year this Court sustained state censorship laws, it said that motion pictures, being mere "spectacles," were not part of the "press." Clearly, this is no longer true.

(1) *No Constitutional Line Can Be Drawn Between Entertainment and Other Expression; Mere Entertainment Must Receive Constitutional Protection*

As seen by the table on the opposite page (the only one of its nature we could find) novels are one of the chief sources for motion picture stories. The present practice of printing motion picture scripts in book form for public consumption casts an interesting sidelight since both forms (original script and published script) are constitutionally exempt from censorship. Many magazines, such as the *Saturday Evening Post*, contain a vastly greater proportion of "pure" entertainment to ideational content than do movies taken as a whole; yet surely the fact that

Source Material of Features 1934-1941

		1934	1935	1936	1937	1938	1939	1940	1941
Original Screen Stories	Number		244	371	391	316	329	323	358
	Percent	40%	47%	67.82%	64.3%	58%	56.3%	61.8%	63%
Stage Plays	Number		41	38	39	30	34	51	57
	Percent	12.5%	8%	6.96%	6.4%	5.5%	5.8%	9.8%	10%
Novels	Number		142	92	102	140	127	109	58
	Percent	24%	26.4%	16.8%	16.8%	25.7%	21.7%	20.8%	10.2%
Biographies	Number		3	2	12	2	17	8	4
	Percent	2.5%	.6%	.37%	2%	.3%	2.8%	1.5%	.7%
Short Stories	Number		37	39	46	54	59	21	82
	Percent	11%	7%	7.13%	7.6%	10%	10.6%	4%	14.5%
Source Unknown	Number		28		11		10		5
	Percent		6.4%		1.8%		1.6%		.9%
Miscellaneous	Number		24	5	7	3	8	11	4
	Percent	10%	4.6%	.91%	1.1%	.5%	1.2%	2.1%	.7%
Totals	Number		519	547	608	545	584	523	568
	Percent	100%	100%	100%	100%	100%	100%	100%	100%

(Footnotes omitted.)

(From *Film Facts*, p. 54, published by the Motion Picture Producers & Distributors of America.)

the *Post* contains mainly mere entertainment does not exclude it from the protection of the First Amendment, nor does the fact that it is produced to make money. Surely the fact that movies are exhibited in theatres can make no difference (see *infra*, pp. 23-24). Moreover, since an integral part of the right to free speech is the right to see and hear, and since the motion picture today represents one of the most accessible sources for information for persons located everywhere in this country, it would be most anomalous to hold that this most vital means of communication was alone subject to censorship.

It is now established that in preserving what Mr. Justice Frankfurter, concurring in *Hannegan* v. *Esquire*, 327 U. S. 146, 160 (1946) termed "the very basis of a free society * * * the right of expression beyond the conventions of the day," there can be no line drawn between the instructive and the aesthetic. To the contention that the freedom of the press applies only to the exposition of ideas, this Court replied in *Winters* v. *New York*, 333 U. S. 507, 510 (1948):

> "The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."

The opinion of the Appellate Division below demonstrates the accuracy of this doctrine. After admitting that "in a sense" the statute "impinges on freedom of expression so far as religion is concerned,"* the Appel-

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* These phrases were used below in relation to another statute (Penal Law, Section 2074) which the court stated "also" impinged such freedom. The Appellate Division reasoned that Section 2074 was constitutional, though it prohibits exhibitions in which there shall be a living character representing the deity of any known religion,

late Division held that the film was "produced purely as an entertainment spectacle" (R. 91), and went on to hold that it did discuss the merits of certain religious dogma. To paraphrase this Court, "What is amusement to the Appellate Division, is also doctrine to the Appellate Division." Though the film was entertainment, obviously it would not have been censored had it not taught "objectionable" doctrine. The public is shielded from such doctrine because the doctrine is thus mere entertainment. The opinions below finally inter the dead doctrine that movies are solely entertainment. Motion pictures are no more pure entertainment sans ideas than are novels, and no one doubts that novels are entitled to the protection of the First Amendment.

Even if motion pictures were mere entertainment, it would be vitally important to stop censorship to prevent their continuance as mere entertainment, and to permit them to flourish as an important art form along with books and plays. Without censorship to stop development of

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because no one ever challenged it. But the reason no one has challenged it is that no one has ever enforced it. Thus, Pulitzer Prize-winning play "The Green Pastures" in which the chief role is that of "De Lawd," ran—in a revival—on Broadway only last year, in spite of protests that it was sacrilegious (N. Y. Times 3/26/51, p. 24, col. 2), with no state action taken to prevent it. And the film "The Next Voice You Hear —" ran in New York last year, without any legal difficulties, though it too personified the Deity. Nor do we know of any film previously banned—in New York or anywhere else in this country—because of sacrilege. "The Miracle" seems to have been singled out.

Section 2074 prohibits the production of Passion Plays, Nativity Plays or other Christological portrayals, many of which are performed regularly throughout the community without incident and have become an integral part of Christian sectarian devotional exercises. These plays present Jesus Christ as a character although he is the Deity according to Catholic dogma. (*A Catechism of Christian Doctrines*, rev. ed. of the Baltimore Catechism (1949), Lesson 27 at p. 24: "Is the Son, God?" Answer: "The Son is God and the second Person of the Blessed Trinity.")

the theatre, even musical plays, as Richard Rodgers has stated:

> "* * * are beginning to have something to say. They've gotten into long pants. So people are going to see them. * * *"
>
> (As quoted in February, 1952 edition of *Columbia Alumni News*, at p. 26, col. 3.)

One of the principal ends of the First Amendment is to create an atmosphere in which the arts may flourish. To that end the censor's timid, pruning hand is banished. So, in the historic letter from the Continental Congress to the Inhabitants of Quebec, it was stated that the importance of freedom of the press consists "in its diffusion of liberal sentiments on the administration of Government" in addition to "the advancement of truth, science, morality, and *arts in general*".*

As Bosley Crowther, the noted film critic of the New York Times, and perhaps the leading authority on the current screen, has stated in regard to this very case:

> "The petitioner, Joseph Burstyn, who has carried the case to the highest court; his lawyer and many others who have the freedom of the screen at heart are hopeful that a full and final showdown on film censorship will be achieved—that the old stigma on movies as cheap entertainment will be legally removed. And well they may hope for liberation, for the whole future of the American screen would seem to depend upon its freedom to

* Journal of the Continental Congress, 1904 ed., vol. I, p. 108. Italics added. This letter has been considered sufficiently significant in determination of the extent of protection afforded by the First and Fourteenth Amendment to be quoted at least twice by this Court. *Near* v. *Minnesota*, 283 U. S. 697, 717 (1931); *Thornhill* v. *Alabama*, 310 U. S. 88, 102 (1940).

grow up and handle subjects that have heretofore been taboo.

"Such freedom would not encourage license, any more than the freedom of the press encourages publishers and broadcasters to abuse their prerogatives. On the other hand, it would stimulate artists in the motion-picture realm to reach out for dramatic material of vitality and pertinence to life and shape it to meaningful screenplays uninhibited by the restrictions of censorship laws.

"Certainly the growing competition for the popular audience presented by TV—which, incidentally, is not subject to the laws of censorship—makes it imperative that movies continue to improve in quality so that they may draw the discriminating patrons who are interested in genuine adult themes. Unless the screen is free to cultivate this audience, with taste and intelligence, it will be doomed. A great and potential art medium will be forced to theatrical decay—at least, in this great and vital country where it has found its most stimulating soil.

"That is why everyone who is truly interested in the screen should await with bated breath the decision of the Supreme Court in the 'Miracle Case.'"

(New York Times, Feb. 10, 1952, first page of Section 2.)

Therefore, even though decision on this issue may be unnecessary to the disposition of this case, we urge that the Court pass upon the issue of the constitutionality of pre-censorship of motion pictures, lest, as a leading expert in the field predicts, the screen be doomed.

(2) *In Any Event, Films Not Now Mere Entertainment*

While at the time of the *Mutual Film* decision, films were mainly geared for entertainment, and might possibly have been constitutionally regulated by censorship (*cf.* Mr. Justice Frankfurter in *Kovacs* v. *Cooper*, 336 U. S. 77, 96, as quoted below, R. 157),* a look at the modern Billboard discloses a completely different situation. In place of the nickelodeon and flickers are motion pictures dealing with important social and economic issues. Film producers have brought into the open the problems of the returning veteran (*Best Years of Our Lives, The Men, Bright Victory*), and the problems of anti-Negro and anti-Semitic prejudice (*Lost Boundaries, Gentlemen's Agreement, Home of the Brave, No Way Out, Pinky***). All combined

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* Whether motion pictures were mere entertainment even in 1913, when the *Mutual Film* case was begun, is open to question. On May 26, 1914, the New York Times had commented editorially that movies "are broadening the public knowledge," that "some of the current picture shows are really marvels of selection, patience and skill and they will always survive as illustrations of travel, as aids to the understanding of natural history." N. Y. Times, 5/26/14, p. 10, col. 3. See also Jacob, The Rise of the American Film, p. 77: "Movies were by this time (1908) acknowledged not as just an innocent novelty but as a powerful medium of social expression * * * one of the chief sources for new ideas, points of view, attitudes toward government and society, habits of mind, standards of taste, conduct, morals, canons of convention, culture. * * * How powerful a social agency the motion picture could be was still, however, to be realized." And it was only seven days after this Court's decision in the *Mutual Film* case was handed down that the N. Y. Times ran a review of the controversial film on the social, economic and political aspects of the Civil War, *Birth of a Nation*. N. Y. Times, 3/14/15, Sect. 7, p. 10, col. 1-4; Jacob, op. cit. *supra*, pp. 171-222. Again in 1915, the N. Y. Times (10/31/15, Main Section, p. 16, col. 5) commented editorially that "the educational side of the (motion) pictures is not to be ignored * * *." And as early as 1920, the movies consciously engaged in anti-communist propaganda at the suggestion of the U. S. Secretary of the Interior. *Jacob*, p. 398.

** The Texas Court of Criminal Appeals recently affirmed a local ban on *Pinky*. (*Gelling* v. *The State of Texas*, decided January 30, 1952, not yet officially reported.) An appeal was docketed in this Court on April 15, 1952.

some degree of entertainment with some degree of serious treatment of social issues. Most critics felt that the value of these pictures as effective social comment increased in direct proportion to their quality as entertainment. It would be strange indeed if treatment of social issues could be banned the moment it began to possess entertainment value as well.

A glance at the list of Academy Awards to motion pictures, their stars and directors, over the last fifteen years (see Appendix I, *infra*, pp. 67-69) demonstrates the increasing importance of social and historic content in important films. As early as 1930, the movie industry produced the great anti-war picture, *All Quiet on the Western Front,* in the same year that it produced the story of *Disraeli.* In 1933, the two historical dramas, *Cavalcade* and *Henry VIII* took awards. A story of the psychological problems of *The Informer* took awards in 1935, and the acid social satire of *Mr. Deeds Goes to Town* received the honors the next year. The inspiring *Life of Emile Zola* and Pearl Buck's commentary on modern China, *The Good Earth,* took awards in 1937. *Boys' Town,* a story of a priest's reformation of juvenile delinquents, won an award for its male star in 1938. *Gone With the Wind,* a fictionalized treatment of the Civil War, won three awards in 1939. *The Grapes of Wrath,* John Steinbeck's story of America's D.P.'s, the "Okies," won an award for its director in 1940. *How Green Was My Valley,* a story of coal miners' problems, and *Sergeant York,* a story of that hero's physical bravery and spiritual conflict in World War I, both took awards in 1941. In 1942, *Mrs. Miniver* (British heroism under bombing of World War II), and the patriotic musical, *Yankee Doodle Dandy,* took awards; the deeply religious *Song of Bernadette* and the anti-Nazi *Watch on the Rhine* were winners in 1943. The touching story of two Catholic priests in *Going My Way* won the

Academy Award in 1944. A psychological study of the alcoholic, *The Lost Week-End,* won in 1945. *The Best Years of Our Lives,* a study of the problems facing returning veterans, won in 1946. *Gentlemen's Agreement,* an attack on anti-Semitism, won in 1947. *All the King's Men,* a slightly-disguised version of the rise of "dictator" Huey Long in Louisiana, won in 1949. In 1950, *Born Yesterday,* a comic treatment of the corruption in Washington, won an award for its leading actress.

Further proof that motion pictures are not mere entertainment, and that a line cannot be drawn between information and entertainment,* can be found through a study of current motion pictures. We have examined the issue of *Cue* magazine on the newsstands the day this section is being put in its first draft. The February 23, 1952 Manhattan issue of that New York magazine carries, as do all its issues, "Brief Movie Reviews" of movies playing that week in the Borough of Manhattan in the City of New York, a good cross-section of those produced annually throughout the country. An analysis of the 166 movies reviewed (pp. M-21 to M-23) indicates that at least 42, or more than 25% thereof, have some social, historical, or informational significance. We have collated these 42 pictures, together with appropriate quotations from *Cue's* or other reviews, in part A of Appendix II to this brief (pp. 70-73). The other 125 pictures are also listed by name in part B. We have listed in part A

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* Mr. Justice Holmes delighted in his experience of an instance of a mixture of information and entertainment, particularly relevant to this case. In a letter of August 9, 1897, he had this to say: (1 Holmes—Pollock Letters, 76-77) "Brooks Adams * * * can tell you history with inimitable vividness not unmixed with enhancing profanity. Thanks to him I have had more fun out of the crusades than any of the actors in them ever did, and he is really fine when he gets going on the Church of England. Also his presentation of the Catholic priesthood as medicine men is tickling to the malevolent fancy."

only those pictures which *clearly* have such significance; doubtless it could be well argued that many pictures listed in part B had such significance as well.

(3) *General Recognition That Motion Pictures Not Mere Entertainment*

The importance of film as a medium of expression was recognized by the American Academy of Political and Social Science as early as November, 1926, when it devoted an entire issue of its Annals to "The Motion Picture in its Economic and Social Aspects." There is something in almost each picture that is more than mere entertainment. See on this, Jacob, *The Rise of the American Film* (1939), in which he analyzes every movie produced to that date for its social content; see also the bibliography in Jacob, *ibid.* at 541-564. Jacob's closing remarks (pp. 538-539) are well worth quotation.

> "Nearly a half-century of American life could not slip by without affecting the motion pictures; nearly a half-century of motion pictures could not pass before the public gaze without affecting American life. Under the guise of entertainment movies have always not only reflected but instilled ideas and attitudes. Their power and subtlety of expression have intensified, their scope has broadened, and a widening audience has made their influence ever more potent. While being the 'mirror of history,' as Will Hays has said, this young art—in 1896 'another toy for Thomas Edison—has shaped the thought and course of twentieth century America.'
>
> "Within the span of our own lifetime the American movie has come up from a minor nickel novelty to one of the foremost industries of the world whose investments total billions of dollars yearly and

whose markets extend throughout the world. Beginning as a mechanical form of amusement, without any pretensions to art, the movie has enlisted all of the older arts, has developed artists within its own realm, and has discovered its own distinguishing characteristics and standards as a unique medium of expression. At the same time the moving picture has grown from a limited and comparatively simple recording device to a subtle and complex social instrument so vast in range and powerful in effect that it has become one of the most influential agencies of modern times.

"This phenomenal rise has been brought about by the interaction of business man, artist, and scientist. Each has contributed with varying degrees of potency to the movie's development in every stage. After almost half a century of progress, the American film has achieved a degree of maturity. It now moves forward toward a more profound destiny. Its future lies in the creation of new forms of expression, in the deepening of its content, and in the elevation of its integrity and its point of view."

It would seem hardly necessary to point out that the importance of the screen as a means of expression is well-recognized today, but we nonetheless document this contention further.* Eric Johnston, former President of the

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* It is noteworthy that private censors themselves have acknowledged the true nature of the film. Motion Picture Production Code: "2—Correct standards of life shall, as far as possible, be presented.

"*A wide knowledge of life and living* is made possible through the film. When right standards are consistently presented, the *motion picture* exercises the most powerful influences. It *builds character, develops right ideals, inculcates correct principles*, and all this in attractive story form.

"If motion pictures consistently *hold up for admiration high types of characters* and present stories that will affect lines for the better, they can become the most powerful natural force for the improvement of mankind." (Italics supplied.)

Motion Picture Association, wrote Mrs. Franklin D. Roosevelt on May 7, 1946 that "the motion picture is one of the most potent instruments ever devised for the dissemination of ideas, information and mutual understanding between peoples. The motion picture no longer is looked upon solely as a device for mere entertainment." (As quoted in Inglis, Freedom of the Movies, p. 5.) Important too, are the three quotations below from leaders in the industry:

> *Murray Silverstone*, Pres., 20th Cent.-Fox: "Our industry is today more aware than ever before that movies are one of the most powerful forms of expression and persuasion. There is, therefore, complete agreement that the motion picture must continue as an articulate force in the postwar world so that it can contribute vitally and validly to the development of permanent peace, prosperity, progress and security on a global basis. It means that the motion picture has definitely broadened its scope of activity to include many more themes which can be presented in dramatic and entertaining manner." (*Variety*, Jan. 9, 1946, as quoted *id.* at 11-12.)
>
> *Samuel Goldwyn:* The two jobs of the screen are "to entertain and to educate. * * * pictures * * * teach when they are pretending not to." (N. Y. Times Magazine, April 22, 1945, as quoted *id.* at 12.)
>
> *Barney Balaban*, President of Paramount Pictures: "The screen can hope to do something more than to provide purely escapist entertainment." (N. Y. Times, March 24, 1946, as quoted *ibid.*)
>
> *Jack L. Warner*, of Warner Brothers: "Honest exchange of information and ideas is the primary function of motion pictures as well as of newspapers and the radio." (N. Y. Times, Dec. 18, 1945, as quoted *id.* at 11.)

But it can hardly be doubted that fear of the censor has prevented the screen's growth to full maturity as a medium of expression. As Daryl Zanuck has put it in *Treasury for the Free World* (as quoted *id.* at 17):

> "Let me be blunt. The fear of political reprisal and prosecution has been a mill stone around the neck of the industry for many years. It has prevented free expression on the screen and retarded its development. The loss has not been merely our own. It has been the nation's and the world's. Few of us insiders can forget that shortly before Pearl Harbor the entire motion picture industry was called on the carpet in Washington by a Senate committee dominated by isolationists and asked to render an account of its activities. We were pilloried with the accusation that we were allegedly making anti-Nazi films which might be offensive to Germany."

It has been frequently recognized in Congress that motion pictures are more than mere entertainment, that, indeed, they have much educational and propagandistic content. As early as 1922, a Senate Resolution (S. Res. 142) was introduced by Senator Myers to investigate the political activities of motion picture producers (62 Cong. Rec. 5621). Interestingly enough, he recognized that "It (the motion picture) may furnish not only amusement but education of a high order" (62 Cong. Rec. 9655, 9656), arguing that it is the duty of the state to see that people are educated "correctly" (*id.* at 9657). Congressman Black recognized as early as 1929 that motion picture censorship is prohibited by the First Amendment, in giving this as the reason why Congress had not enacted such censorship laws (70 Cong. Rec. 3554). In 1942, two Resolutions were introduced into Congress to investigate war propaganda in the movies

(S. Res. 152, H. Res. 292, reported respectively at 87 Cong. Rec. 6565 and 6903). A third Resolution, H. Res. 107, was also introduced to investigate the industry generally. Perhaps Congress was especially aware that year of the ideational content of motion pictures because that year a film, "An Adventure in Washington", severely critical of Congress, was exhibited and drew Congressional notice (87 Cong. Rec. 4231). (The film dealt with apparent tolerance by the Senate of hooliganism practiced by its pageboys.) In 1947, Senator Martin commented on education through the medium of the motion picture (93 Cong. Rec. 9000), and that same year, a subcommittee of the House Committee on UnAmerican Activities reported on Communist influence in the motion picture industry (93 Cong. Rec. A2687). The House Committee has been sporadically investigating Hollywood ever since.

Unless, then, the First Amendment is to be restricted to Eighteenth Century media of communication, along with the hand press that first printed it, its protection must be extended to the media of communication which the technology of our age has developed. The hand press is protected because it can be a conveyance of ideas to numbers of people. The so-called "mass media," and specifically motion pictures, must be protected just because they are more effective, more graphic and reach a wider audience.

More so than with the hand press, the guarantee of freedom must protect motion pictures not only in the interest of our society—the interest of those who see and hear—but also in the interest of the producers. Because of the great investment needed to use this medium, it is susceptible to the censor's slightest whisper. The investment is usually safest when its product carries the least innovating message. The slightest threat by previous

administrative restraint enervates the spirit of freedom which must instead be nourished if this giant descendant of the hand press is to advance "truth, science, morality and arts in general." *Cf.* Donnelly, *Government and Freedom of the Press*, 45 Ill. L. Rev. 31 (1950).

Today the *Mutual Film* case is as anachronistic as the nickelodeon. It endangers the very principle of freedom by its emphasis on the mechanism rather than the function of the press.

C. The New York State Censorship Law establishes a previous administrative restraint, the form of restraint which inevitably and most completely violates the freedom of the press.

With the *Mutual Film* case laid to rest, it follows that the censorship law here involved must be held invalid on its face.

Such a result is compelled by the First Amendment, for, as stated by this Court (*Thornhill* v. *Alabama, supra*, 97):

> "* * * Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. *Schneider* v. *State*, 308 U. S. 147, 162-165; *Hague* v. *C.I.O.*, 307 U. S. 496, 516; *Lovell* v. *Griffin*, 303 U. S. 444, 451. The cases when interpreted in the light of their facts indicate that the rule is not based upon any assumption that application for the license would be refused or would result in the imposition of other unlawful regulations. Rather it derives from an appreciation of the character of the evil inherent in a licensing system. The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the

> censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near* v. *Minnesota*, 283 U. S. 697, 713."

Thus the freedom-of-press guarantee of the First Amendment is aimed, first of all, against licensing the dissemination of material. This does not exhaust the guarantee, but is its minimum compulsion. As Justice Holmes said, dissenting in *Leach* v. *Carlile*, 258 U. S. 138, 141 (1922):

> "Even those who interpret the (First) Amendment most strictly agree that it was intended to prevent previous restraints."

The previous administrative restraint here established is repugnant to the First and Fourteenth Amendments because by it the repression of unconventional ideas is made immeasurably extensive. No restriction could be more sweeping in its effect. Every motion picture must be submitted to a censor at whose discretion its public exhibition may be barred. Therefore, even if a judicial remedy for the abuse of the censor's power is available, such a previous restraint upon speech and press is inadmissible. *Cantwell* v. *Connecticut*, 310 U. S. 296, 306 (1940); *Largent* v. *Texas*, 318 U. S. 418, 422 (1943).

Moreover, since the reach of whatever discretion is granted a censor cannot be controlled save by judicial review, administrative restraint in advance of exhibition in any case must result in effective suppression for some period of time. The threat of postponement of exhibition effectively abridges the protected freedom. And, as with

other forms of publication, the right to timely release of motion pictures is an important part of that freedom.* See *United States* v. *Paramount Pictures, supra,* at 167.

The unusual situation found in the instant case, in which the Board of Regents revoked the license two years after its original issuance, points to an additional evil. Whatever protection or assurance might be given to the producer of a film by its original licensing, means absolutely nothing whatsoever, if at any time thereafter the Board might revoke that license—a most substantial impediment to the production of controversial movies. The opinion of the Appellate Division held it proper for the Board to consider "complaints received" as evidence to be relied upon. The Board is thus left to be pushed by the winds of opinion, to be continuously in the anomalous position of having to take the risk of offending either a private group or the vast majority of the public. As this case demonstrates, a motion picture censorship board is at the mercy of pressure groups.

Surely, the instant case presents the classic example of previous administrative restraint frankly aimed at the suppression of ideas. Laws and ordinances in many forms which merely obliquely approach such absolute censorship have repeatedly been struck down by this Court. It cannot be imagined that a law submitting such products of the printing press, as newspaper columns or novels to all-inclusive pre-publication supervision by a state agency could be proposed in the United States, let alone defended or tolerated by the First Amendment. Such censorship can have no constitutional application or existence, as this Court has repeatedly and unanimously held. *Largent*

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* This doctrine had not been developed before the *Mutual Film* case was decided, when this Court stated (236 U. S. at 242) that "however educational or entertaining, there is no impediment to their value or effect in the Ohio statute."

v. *Texas, supra*, and the cases there cited; see *American Communications Association* v. *Douds*, 339 U. S. 382, fn. 18 (1950). To permit such pre-censorship of motion pictures would be to render nugatory the First Amendment, to hold that the Constitution cannot keep pace with modern technology.

The *Mutual Film* case went so far as to indicate that any theatrical production was subject to pre-censorship, whether on stage or screen.* The *ratio decidendi* was that such "spectacles" are just a business for profit and that they are seen by mixed audiences of males and females, children and adults. The first theory is no longer tenable today, in view of the *Winters, Hannegan*, and *Paramount Pictures* cases. The second theory must fall as a matter of law and logic, even were it not rendered nugatory by this Court's dictum in *Paramount Pictures*. This for three reasons: 1) All speeches and assemblies are composed of mixed audiences, and surely are not subject to licensing for this reason. 2) There is no proof whatsoever that "harmful" material is rendered more potent because viewed in a mixed audience; on the contrary, the presence of adults with children would seem to render this "evil" least potent than "evil" material read secretly by a child. Moreover, the high prices charged for motion picture admission would minimize the possibility of children seeing movies without parental approval. 3) There is no reason whatsoever to suppose that the ordinary criminal law of obscenity or such prevalent

* It could hardly be argued that this Court would today permit any attempt at pre-censorship of the theatre. Yet the imminence of full-length three-dimensional motion pictures (N. Y. Herald Tribune, March 25, 1952, p. 19, col. 5) indicates that there will soon be no real difference between stage plays and motion pictures in the eyes of the viewers thereof. It would be highly anomalous indeed if one-dimensional movies were to be subject to censorship, but not three-dimensional ones.

statutes as Section 722 of the New York Penal Law cannot deal with any "evils" produced by any motion picture less effectively than they can deal with similar "evils" produced by printed material. The availability of these other remedies makes unconstitutional this extraordinary remedy. *Thornhill* v. *Alabama*, 310 U. S. 88, 95-96.

The First Amendment protects the distributor of handbills, of detective magazines, and the speaker whose unaided voice attracts ten listeners in a park. In a time of many remarkable innovations in means of communication, regard for the principles of the First Amendment must reject an interpretation of "press" in terms of form rather than substance.

* * * *

The *Mutual Film* decision is today nothing more than an anomalous shade. What substance it may once have had has long since been sapped by recognition that the First Amendment through the Fourteenth limits state power. What vitality it may once have had has been negated by the clear implication of the many cases in which measures licensing the dissemination of ideas have constitutionally been condemned. Its authority has been denied, although *obiter*, nevertheless specifically, by this Court itself. The *Mutual Film* decision should now finally be declared obsolete.

POINT II

The law permitting revocation or denial of a license because of a finding that a film is "sacrilegious" constitutes a law respecting an establishment of religion and a prohibition of free exercise thereof in violation of the First and Fourteenth Amendments to the United States Constitution.

A. The Constitutional Issue.

This Court has repeatedly held that the prohibition against laws respecting an establishment of religion and prohibiting the free exercise thereof imposed upon Congress by the First Amendment is made applicable to the states by the Fourteenth. *Everson* v. *Board of Education of Township of Ewing*, 330 U. S. 1 (1947); *McCollum* v. *Board of Education*, 333 U. S. 203 (1948); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1939); *W. Va. State Board of Education* v. *Barnette*, 319 U. S. 624 (1943).

In the first two cases listed above, this Court carefully spelled out the implications of the two Amendments. The Court stated:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form

> they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" *Everson* case, *supra*, 330 U. S. at 15-16; *McCollum* case, *supra*, 333 U. S. at 210-211.

This standard, we submit, requires invalidation of Section 122 of the Education law insofar as it prohibits the exhibition of "sacrilegious films." Examination of this statute as interpreted in the decision by the Court of Appeals below establishes that its purpose is to "aid all religions," "aid one religion" and "prefer one religion" over others. By the suppression of motion pictures found to be "sacrilegious," Section 122 inflicts punishment for "entertaining or professing religious beliefs or disbeliefs." Finally, by requiring state agencies to pass upon the religious propriety of motion pictures, Section 122 of the Education law necessarily compels the state to intervene in sectarian religious affairs in contravention of the mandate of the First Amendment.

B. Sacrilege and Heresy.

(1) *Definition of "Sacrilege" by Court of Appeals.*

Section 122 of the Education Law provides for the withholding of licenses by appropriate state authorities from any film which is determined to be "sacrilegious." We assume that the definition of "sacrilege" by the Court of Appeals below, as the highest court in the State of New York, is conclusive here. We submit, nonetheless, that it is pertinent to note the degree to which the opinion below departed from the original meaning of the word to

support the ban placed by the Board of Regents on this film. The difficulties encountered in formulating a relevant definition of "sacrilege" derive from the fact that the only offense of which "The Miracle" is properly guilty is the offense of heresy.

Research has disclosed no American court decision prior to this case which has defined "sacrilege." In virtually all the definitions offered by standard dictionaries, the term "sacrilege" is restricted to the profanation or desecration of *physical objects* dedicated to religious purposes. *Webster's New International Dictionary of the English Language*, 2nd Ed. (1940); Black, *Dictionary of Law*, 3rd Ed. (1933); Bouvier, *Standard Law Dictionary*; Abbott, *Dictionary of Words and Phrases*. The only judicial construction of the term "sacrilege" which has been found in the English cases similarly limits its meaning. (7 and 8 Geo. IV, Ch. 29, Sec. 101; 24 and 25 Vict. Ch. 95, Sec. 1, 19.) In upholding the revocation of licenses, however, the Court of Appeals sought support in one of the definitions found in the Funk and Wagnalls Dictionary —cited as its sole authority—defining sacrilege as "the act of violating or profaning anything sacred" (R. 51). We suggest that emphasis properly belongs on the word "thing." With no further explanation the Court says elsewhere in its opinion that the prohibition of sacrilege means "simply this: that no religion, as that word is understood by the ordinary, reasonable person shall be treated with contempt, mockery, scorn and ridicule * * *" (R. 154).

As we shall show later, this definition is still fatally vague and ambiguous. But whatever its precise meaning, it is questionable whether even in its own terms it is applicable to the present case. The record discloses that some Roman Catholic clergy found the film offensive while

responsible spokesmen for Protestant and Jewish religious groups found the film not only unoffensive but profoundly religious (R. 44-45, 96-144). At most, the film offends only those committed to a single distinctive theology. "The Miracle" has been banned because it is non-conforming, not because it is irreligious.

(2) *The decision below in fact involves suppression of heresy.*

Blackstone defines heresy as "An offense against religion, consisting not in total denial of Christianity, but of some of its essential doctrines publicly and obstinately avowed." IV. *Blackstone's Commentaries,* 44, 45. The most that can and has been charged is that "The Miracle" is a satirical comment on the dogma of the Virgin Birth of Christ. We shall not here attempt to argue whether the specific incidents of the film sustain this charge. We assume, *arguendo,* that they can be so found by some religious groups. Under the terms of the definition suggested by the Court of Appeals itself, however, this is not enough. In the opinion below, the Court clearly declared that in order to sustain the prohibition of any film under Section 122 it must first be established that a "religion" as that word is ordinarily understood has been dealt with contemptuously. This does not mean that a film may be prohibited whenever it is deemed offensive to some special tenet of an orthodoxy. The definition offered by the Court does not require that each of the specific theological assumptions of a particular creed be made immune from examination or criticism.

Unlike its language, however, the Court's decision requires exactly that. Literal acceptance of the New Testament account of the Virgin birth which allegedly has been satirized is not the essential dogma even of all creeds

within Christianity. This is apparent in the remarks of a past Chief Justice of this Court and one-time President of the United States, William Howard Taft, who included himself among those observant and practicing Christians who "deny that they lose the essence of Christianity when they give up miracles, the Virgin birth and the deity of Jesus." Taft, *The Religious Convictions of an American Citizen,* cited in Swancara, *The Separation of Religion and Government* (1950). Exactly that attitude for which "The Miracle" has here been penalized was expressed by another President of the United States, Thomas Jefferson, in a letter to John Adams. Jefferson wrote: "The day will come when the mystical generation of Jesus, by the Supreme Being as his father, in the womb of a virgin, will be classed with the fable of the generation of Minerva in the brain of Jupiter." Jefferson, *Memoir, Correspondence and Miscellanies,* edited by Thomas Jefferson Randolph (1829), Vol. IV, p. 365. Significantly, in this same letter, Jefferson remarked that he was compelled to reject Calvin's teachings because "He was an atheist, which I can never be." *Ibid.* In the light of his efforts to evolve constitutional principles which would separate the realm of the Church from the realm of government, Jefferson doubtless would have been astounded to learn that in 1951, in the State of New York, a dramatic presentation of his views would be forbidden by the State as dangerously irreligious.

By banning "The Miracle" the Court below moved away from the protection of religious liberty and assumed a new function: that of underwriting and guaranteeing the perpetuation of particular beliefs by expunging and prohibiting heretical expressions. However we may feel about the special protection of religious groups against slanderous assault, we cannot accept the principle that their

articles of faith, their dogmas, are to be similarly protected. Whatever this Court may hold in *Beauharnais* v. *Illinois*, No. 118, U. S. Sup. Ct. (Oct. Term, 1951), we submit that it is one thing when verbal attacks are made upon a *class qua class* identifiable by race or religion, quite another thing when attacks are made upon the *beliefs* of such a class. To forbid criticism of beliefs would be completely to emasculate the First Amendment.

That we are dealing here with heresy rather than "sacrilege" is evidenced by the fact that "The Miracle" does not engage in a general denunciation of religion. It has already been noted that no spokesman for any religious group other than the Catholic Church has protested the showing of this picture. Significantly the reaction even of Catholics has not been uniform. Those charged with responsibility for reviewing and criticizing motion pictures on behalf of Catholic organizations have been by no means unanimous in their attitude toward the film and some have even been outspoken in their affirmation of its honesty, its sincerity and its high moral and artistic calibre. See Appellant's brief, page 7.

(3) *Once begun, state suppression of heretical views requires a boundless inquisition into religious views.*

Use by the state of its authority for the proscription of heretical religious views represents a point of no return. Once reached, the State will be compelled to censor every motion picture which any one of the hundreds of orthodoxies in our population finds offensive. In his concurring opinion in the *McCollum* case (*McCollum* v. *Board of Education, supra*, 333 U. S. at 235), Mr. Justice Jackson warned this Court that:

> "Authorities list 256 separate and substantial religious bodies to exist in continental United

> States. Each of them * * * has as good a right as this plaintiff to demand that the courts compel the schools to sift within their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds."

Mr. Justice Jackson found this danger even in the public schools where it must be weighed against the unquestionable obligation of the state to supervise the details of curricula and to protect the unformed minds of children against prejudice by sectarian or biased information. How much greater is the danger in the general public forum where the state has no such obligation and where, indeed, efforts to extend such protection are denied and forbidden by the First Amendment.

In the wake of the decision below we may expect that—with as much cogency as the case at bar—other films will be similarly suppressed because of their supposed antipathy to religious principle. Catholic religious groups, speaking through the quasi-official ecclesiastical authority of the Legion of Decency ("Vigilanti Cura," Encyclical Letter of Pius XI, June 29, 1936), have condemned a wide variety of films. These have included *Repeat Performance, Life With Father, The Bishop's Wife, The Miracle on 34th Street, Mom and Dad, Carnival in Flanders, Private Life of Henry VIII, Rasputin, Volpone, Streetcar Named Desire,* and *The Young and the Damned.* For complete list, see Feature Motion Pictures Reviewed by the New York Office of the Legion of Decency (Vols. 1936-1950), distributed by the National Legion.* This follows

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* We are not here opposing the compilation of such lists *per se.* Each group is free to condemn or approve such works as it wishes. We do object, however, to the utilization of these lists by governmental

inevitably from the fact that the function of a religious creed is to encompass in an intimate and direct way the manifold activities of daily existence. Religious beliefs are not expressed only during ritualistic observances; they are not invoked soley during devotional services. To many, religion is an integregating principle designed to inform and deal with daily conduct and to be implicit in everyday behavior. It is no easy task, therefore, to separate events which impinge upon religious beliefs from those which do not; nor will it be an easy task to separate those films which heretically intrude upon religious beliefs from those which do not.

It is appropriate to note that the motion picture *Gentlemen's Agreement*, dealing with the problem of anti-Semitism and generally regarded as possessing sociological rather than religious connotations, was banned by the Film Censorship Board in Madrid, Spain, because of "theological error." *Gentlemen's Agreement* was barred by the vote of the ecclesiastical member of the Spanish Film Censorship Board, not by the vote of the representatives of the secular arm of the state who also serve on that Board. It was suppressed because the solutions it reached and the scenes and situations it presented were

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authorities and to the incorporation of the judgments they contain into the official policy judgments of the state. The criteria private groups employ most frequently are not the criteria upon which the state is compelled to rely under the First and Fourteenth Amendments. Sectarian evaluations made by religious organizations may not simply be taken over whole and adopted by the non-sectarian agencies of government. We submit that, in essence, this occurred in the banning of "The Miracle." That it is not an isolated instance is reflected in the remarks of a spokesman for the Providence, Rhode Island Bureau of Police and Fire following the suppression of the film "The Blue Angel": "If the Legion of Decency condemns a picture, we'll condemn a picture. We go along with the Legion and we'll continue to go along with it." *New York Times*, February 22, 1951.

interpreted as "grievous sin" and as an affront and an attack upon the doctrinal assumptions of Catholicism.*

It is true that this finding was repudiated by statements issued on behalf of Cardinal Spellman by the Chancery Office of the New York Archdiocese and by other leading Roman Catholic churchmen. *New York Times,* October 1, 1948. The fact remains, however, that if high ecclesiastical spokesmen invested with authority by a recognized religious body can denounce a film as "sacrilegious" and forbid its exhibition because the picture espouses so non-controversial a view as religious tolerance, we may feel certain that films disagreeing with the attitudes of religious groups on any one of other significant social and family relations issues will also be found sacrilegious. Church groups are deeply committed on these issues. Many areas of apparently general social concern are charged with an emotional potency born of religious zeal.

The invitation to promiscuous censorship implicit in the decision below is magnified by the fact that "The Miracle" does not itself expressly criticize any religious dogma. It is a completely fictional presentation. At most, any satiric comment it may contain is stated symbolically and by analogy. Similarly, though they make no direct, specific statements about religious principle, it is equally reasonable to believe that films which depict divorced couples as successfully resuming their individual lives, or which implicitly urge the use of contraceptive methods as socially

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* Among the errors attributed to the film by the Censorship Board was the picture's suggestion "that a Christian is not superior to a Jew and that to state the contrary is to accept poison that is instilled by millions of parents into the minds of millions of children." Another of the points to which the Board objected was that the film "says that for many Jews it is a matter of pride to be called Jews. Pride of what? The pride of being the people who put God to death? Of being perfidious, as they are called in the Holy Scripture?" *New York Times,* September 30, 1948.

or eugenically desirable, or which present progressive education in complimentary terms, or which endorse psychoanalysis, may all be interpreted, by analogy, as invidious assaults upon religious dogma, censorable under the terms of Section 122 as construed by the Court below.

These issues are not, of course, before this Court at this time. But they are not far around the corner if judicial arbitration on matters of sacrilege and conformity is here condoned. Religious groups of all denominations have generally refrained from urging state prohibition of statements hostile to their faith. This is not because they have not often felt themselves aggrieved. It is rather because they have been brought to recognize that if we are to preserve religious freedom the force and authority of the state may not be joined to compel solutions to what are at bottom religious differences and religious disputes. The decision of the Court below will do much to upset this willingness to respect the impartiality and neutrality of government. Once opened, this Pandora's box of religious contention will not again readily be sealed.*

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* Counsel for the American Jewish Congress who are participating in the preparation of this brief recently consulted with leaders of national rabbinical organizations with respect to objections asserted by religious authorities to the treatment of Jewish theological conceptions in "David and Bathsheba," a motion picture now enjoying wide commercial success and wide public distribution. Rabbinical spokesmen maintain that "David and Bathsheba" represents Jewish religious convictions in a manner which, in effect, is blasphemous. The Jewish God is depicted as embodying a Deity bent upon vengeance and devoid of compassion. By implication this alleged Jewish theological principle is unfavorably compared with the God of Christianity, represented as a Lord of infinite mercy. Jewish religious leaders have taken strong exception to this defamation of the Jewish God. Despite the real resentment incited by this film, however, and despite the real insult which Jewish religious leaders feel their beliefs to have sustained, the American Jewish Congress together with other national Jewish organizations counseled against any effort to take recourse to the censorship or licensing bodies of the State as a means of prohibiting

(4) *Heresy and Religious Liberty.*

The extent to which the State is thrust into the heart of religious conflict by undertaking to pass upon statements in terms of their "sacrilegious" qualities is clearly illustrated by the attitude of the various religious creeds to the story of the Crucifixion of Christ. Within recent years any number of commercial motion pictures have been produced and publicly exhibited which relate in detailed and graphic terms an account of the New Testament version of the death and betrayal of Christ. Almost without exception these films have portrayed the Jews of the time of Christ as sadistic, brutal and degraded. Because of its rejection of Christ as Savior—because of its theological position—the Jewish community by implication is vilified and bitterly accused.

The Crucifixion story, however, remains a vital and integral part of the doctrinal systems of many sects within Christianity. Although the historicity of Jewish responsibility for the Crucifixion has been repudiated by responsible scholars (Zeitlin, *Who Crucified Jesus?* (1942)), no one has suggested that the presentation of this story be in any way curbed, altered or censored through the intervention of the state. Meanwhile the injury these films inflict is far more grave than the mocking or ridicule which disturbed the Court below. To many leading thinkers of all religious persuasions the Crucifixation story in itself has

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the exhibition of this film or any of its sequences. This position was adopted and accepted because of a consensus that, whatever may be the right of religious organizations to make private representations to motion picture producers or to individual artists to inform them of religious objections to proposed films, certainly there exists no right to involve the State in an attempt to exploit its coercive machinery for sectarian ends. The opinion below, however, utterly destroys the rationale of this consensus. If here sustained, other faiths will no longer have reason not to avail themselves of the same protection which the Court below has granted to Catholic religious beliefs.

intensified anti-Semitism and stimulated the growth of profound religious hatred.*

Because of their reliance upon sectarian dogma the Crucifixion films usually revile and deride Jewish religious beliefs. It is estimated that these films are shown commercially in at least 100 different communities annually. See, *An Analysis of Crucifixion Films*, prepared by the American Jewish Committee, on file at the offices of the American Jewish Congress, 15 East 84th Street, New York, N. Y. They invariably fall within the definition of "sacrilegious" as set out by the Court of Appeals. Does this mean, then, that Crucifixion films may no longer be exhibited within the State of New York? Or that they may be shown only on

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* In an analysis of anti-Semitism by Isacque Graeber appearing in the *Social Action* Magazine for January 15, 1946, published by the Council for Social Action of the Congregational Christian Churches, the following comments are made:

> "James Parkes, in his masterly book, *The Conflict of the Church with the Synagogue*, has laid bare what he elsewhere calls the tap root of anti-Semitism, the cause without which there might never have been any such display of ill-feeling at all. He shows that it was the teaching of the Christian Church which put into words the first definite recognition of a ground of enmity on the part of Christians against the Jews. The ground of enmity was that the Jews had rejected Christ and killed him, and had persisted in their refusal to accept him ever since. While permitted to survive until Christ's Second Coming, they were fated to live in a station suitable to a people steeped in guilt * * * the part played by the Christian Church consisted in clearly defining for the first time the charges against the Jews and implementing action on the basis of those charges. Stated in elementary terms it is the view of the Jew as a Christ Killer. According to this view, the Jews bear the guilt for the rejection of Jesus as the Christ and for his crucifixion. These two charges formed a standing indictment against the Jews for all subsequent ages. The charge of rejecting Christ could be disarmed by conversion and baptism. The charge of having killed Christ could never be withdrawn or denied. On the strength of these *two* charges, the Jews were to be regarded as a people accursed forever, outside the pale of Christian fellowship and exposed to the perpetual wrath of God."

condition that they depart from the sincere beliefs of many Christian denominations? In the absence of any incitement to disorder could the State suppress the showing of Crucifixion films and yet claim to guarantee religious liberty?

On the other hand, the Talmud, a work of pre-eminent value and importance to Jews, has been held by members of other faiths to be totally blasphemous and irreligious. Professor Solomon Grayzel of Dropsie College reports that a number of times in the past, at the direction of Papal authorities, the Talmud was publicly burned because, in the words of Gregory IX, it "contains matter so abusive and so unspeakable that it arouses shame in those who mention it and horror in those who hear it" (Letter from Gregory IX to the King of France, June 9, 1239, quoted in Grayzel, *The Church and the Jews in the XIIIth Century,* (1933) p. 241), and because, in the words of Innocent IV, "In it are found blasphemies against God and His Christ, and obviously entangled fables about the Blessed Virgin, and abusive errors, and unheard of follies." Letter from Innocent IV to the King of France, May 9, 1244, quoted in Grayzel, *op. cit., supra,* at p. 251. Does this mean, therefore, that a film in which the teachings of the Talmud are favorably and sympathetically presented or in which the Talmud and its teachings are extolled, would be denied exhibition in New York under Section 122 on the ground that to some religious leaders it might be "sacrilegious?" And if this is the case, as is implied by the opinion below, then what remains of religious freedom?

To insure religious liberty our constitution clearly disqualifies any government agency from functioning as ecclesiastical arbiter. The courts repeatedly repudiate attempts to induce them to abandon their neutrality and to arbitrate between contending religious views. In 1869, this Court declared without qualification that "the law knows no

heresy and is committed to the support of no dogma, the establishment of no sect." *Watson* v. *Jones*, 80 U. S. 679, 728 (1869). Knowing no heresy, the law obviously can define no orthodoxy. It is beyond the competency of civil government to describe norms of religious conduct. "If there is one fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodoxy in * * * religion, or other matters of opinion * * *." *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 at 642 (1943). Every individual in the community remains free "to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution * * *. Religious expressions which are as real as life to some may be incomprehensible to others." *U. S.* v. *Ballard*, 322 U. S. 78, 86 (1943).

We respectfully submit that our legal system can not pass upon orthodoxy nor can it pass upon heterodoxy; that state authorities can not affirmatively assist religion nor can they suppress criticism of religion; that governmental authorities are constitutionally precluded from sitting in judgment upon religious doctrine nor may they, under the subterfuge of licensing arrangements, seek to distinguish between concepts which are religiously "proper" or "improper", "pious" or "impious", "religious" or "sacrilegious".

> "Our rulers can have no authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others, but it does me no injury for my neighbor to say there are twenty Gods, or no God. It neither picks my pocket nor

breaks my leg." Thomas Jefferson, *Notes on Virginia*, cited in Blau, *Cornerstones of Religious Freedom in America*, p. 78.

The line which separates orthodoxy from "sacrilege" is wavering and ambiguous. It cannot be drawn with certainty, even by those who, by virtue of thorough religious training, might normally be thought best qualified in this endeavor. Secular authority cannot possibly arrogate to itself the function of separating the religiously permissible from the religiously impermissible. All that it can or should do is to permit free expression of all points of view in the conviction that ultimately those attitudes which are healthy and genuine must prevail. The ways of censorship are boundless and its objectives uncertain. To avoid endless embroilment in religious contention the state must exercise a scrupulous and unrelenting neutrality.

The inherent danger to religious freedom is not significantly reduced when, as in the opinion below, opinions critical of religious faiths are prescribed only when they are found mocking or abusive. The awareness of this Court of the need for freedom of religious expression even when it entails violent disparagement of other faiths has been illustrated time and time again. In *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943) the teachings of the Jehovah's Witnesses were held privileged. As typical of those teachings Mr. Justice Jackson in his concurring opinion cited the following excerpts from the volume "Enemies," by J. F. Rutherford:

> "There are numerous systems of religion, but the most subtle, fraudulent and injurious to humankind is that which is generally labeled the 'Christian religion,' because it has the appearance of a worshipful devotion to the Supreme Being, and thereby easily misleads many honest and sincere persons

> * * * (the Roman Catholic hierarchy) is the great racket, a racket that is greater than all other rackets combined. * * * Referring now to the Scriptural definition of harlot, what religious system exactly fits the prophecies recorded in God's word? There is but one answer, and that is, the Roman Catholic Church organization. * * * As those close or nearby and dependent upon the main organization, being of the same stripe, picture the Jewish and Protestant clergy and other allies of the Hierarchy who tag along behind the Hierarchy at the present time to do the bidding or the old 'whore'. * * * Says the prophet of Jehovah: 'It shall come to pass in that day, that Tyre (modern Tyre, the Roman Catholic Hierarchy organization) shall be forgotten.' Forgotten by whom? By her former illicit paramours who have committed fornication with her." *Id.* at 171.

Similarly in *Cantwell* v. *Connecticut*, 310 U. S. 296, broadcasting phonograph records over a public address system on the public streets denouncing the Roman Catholic Church as "an instrument of Satan" was held protected by the First Amendment. And in *Kunz* v. *New York*, 340 U. S. 290, this Court extended the guarantees of the First Amendment to an address delivered on the streets of New York vilifying Jews as "Christ-Killers," and the Pope as "the Anti-Christ." "The Miracle" surely must be held less abusive than any of these.

However regrettable, the religious tenets of every sect are at times intemperately and radically criticized by those of competing religious faiths. This has been true since Biblical times. When Elijah debated the prophets of Baal on Mount Carmel he challenged them to make their god manifest. Significantly, the Book of Kings notes that when Baal failed to reveal himself, Elijah ridiculed and

jeered at the priests and made a mockery of their deity: "And * * * Elijah mocked at them, and said, Cry aloud; for he is a God: either he is musing, or he is gone aside, or he is on a journey, or peradventure he sleepeth and must be awaked." 1. Kings 18.27. In like vein, the authors of the King James version of the Holy Bible found it necessary to refer to the Pope in the preface to their work as "that man of Sin," a remark which ever since has made the King James Bible abhorrent to members of the Roman Catholic Church. Satire and ridicule are often found in religious argument. A vital part of one's freedom to practice one's religion is the freedom to combat any religious error, and, indeed, to reveal opposing religious views as ridiculous and absurd. As this Court noted in *Cantwell* v. *Connecticut*, 310 U. S. at 310:

> "In the realm of religious faith, and that of political belief, sharp differences arise. In both fields the tenets of one may seem the rankest error to his neighbor. To persuade others to his own point of view the pleader, as we know, at times, resorts to exaggeration, to vilification * * *, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

It is no answer to say, as the Court below has declared, that freedom of religion is not impaired by Section 122 of the Education law because other sections of the statute exempt religious presentations "as ordinarily understood" from the licensing provisions. Actually, no such exemption exists. The Board of Regents has provided by

regulation that no permit may be issued to *any* film found to be "obscene, indecent, immoral, *sacrilegious* * * *," (Rules and regulations for review and licensing of motion pictures, issued by the Board of Regents of the University of the State of New York, Regents Rules, paragraph 244.) Thus in this respect the same requirements must be met by films exhibited for religious and educational purposes as by films shown for any other purpose. Moreover, the Court below was quick to recognize the religious implications of "The Miracle," a film which could hardly be considered as addressing itself directly to theological or religious matters. If state statutes permit free expression of religious beliefs only when they come properly packaged and labeled and only when they are made the primary object of a formal "religious presentation," then we are not enjoying freedom of belief as contemplated by the framers of the First Amendment. It is well understood that religious ideas are not expressed or expressible only in formal documentary statements of conviction. Frequently they find their outlet in artistic works which fulfill other functions.

> "Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet the inspirational point of view of religion in these guises is often stronger than in forthright sermon. * * * The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity —both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples." Justice Jackson concurring in *McCollum* v. *Board of Education, supra,* 333 U. S. at 236.

To permit the freedom of dissenting religious belief only when it comes properly stamped, is to deprive it of the freedom guaranteed by our Constitution. Special protection of some religious views by prohibition of contradictory views must be regarded, as it always has been regarded, as the suppression of heresy.

Heresy is clearly outside the scope of secular law. Even in England, where there exists a formally established church, heresy "is now subject only to ecclesiastic correction and is no longer subject to punishment by the secular law." 4 *Stephen's Commentaries*, 233. Surely in the United States, given the requirements and limitations of the First Amendment, neither the authority of the courts nor of any agency of the state may be harnessed to an inquisition into or suppression of heretical belief.

C. Sacrilege and Blasphemy.

Even if we assume that no question of heresy is here involved we must nevertheless find that Section 122 of the Education law is properly analogous to legislation in other jurisdictions regulating blasphemous statements. License Commissioner Edward McCaffrey of New York City first sought to revoke the license of "The Miracle" because he found it "officially and personally blasphemous" (*New York Times*, Dec. 24, 1950); moreover the definition of "sacrilege" as used in Section 122 by the Court below as meaning the profaning or ridiculing of religion coincides exactly with the definition of blasphemy in other states. (Blasphemy is: "* * * maliciously reviling God or religion," *People* v. *Ruggles*, N. Y. 8 Johns. 290, 292 (1811); "* * * exposing [God or the Holy Scriptures as contained in the Old and New Testament] to contempt and ridicule," *State* v. *Mockus*, 120 Me. 84, 91 (1921); "* * * the expression of defiant impiety and irreverence

against God or things held sacred," Funk and Wagnall's *New Standard Dictionary of the English Language* (1935). See also *Commonwealth* v. *Kneeland*, 37 Mass. 206, 213 (1836); *Updegraph* v. *Commonwealth*, 11 S & R (Pa.) 394 (1824).) We submit that Section 122, like all other blasphemy statutes, is unconstitutional.

(1) *Suppression of blasphemy as an aid to established religion.*

Laws penalizing the expression of irreligious and blasphemous views have their inception in efforts to protect and aid religion. Historically, their sole reason for being has been that they contribute to precisely that kind of establishment of religion which is forbidden under our Federal Constitution.* The early common law plainly regarded blasphemy as an offshoot of and complement to the crimes of apostasy and heresy, crimes which ordinarily had no place in temporal courts.** All of these crimes

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* Because of Blackstone's formulation of blasphemy as a common law offense (See Chitty's *Blackstone*, Vol. IV, p. 42), it may mistakenly be assumed that early common law courts took ready jurisdiction of blasphemy as an offense properly cognizable in civil courts. On the contrary, examination of the historical development of the concept discloses that originally blasphemy was the exclusive concern of the ecclesiastical courts and for centuries was held to be without secular implication. Nokes, *Crime of Blasphemy* (1928), 1-20. The temporal courts, both civil and criminal, accepted jurisdiction in this field only tentatively and reluctantly, recognizing at all times the overriding interest of the church and its exclusive competence in deciding questions involving allegedly irreligious statements. *Davis* v. *Gardiner*, 4 Coke 16b (1593); *Bury* v. *Chappell*, Gould. 135; *Ireland* v. *Smith*, 1 Br. & Gold. 12.

** *Palmer* v. *Thorpe*, 4 Coke 20a; Specot's Case, 5 Coke at 57b; *Nicholson* v. *Lyne*, Cro. Eliz. 94; *Halwood* v. *Hopkins*, Cro. Eliz. 787. Blasphemy, in the early English common law, was viewed merely as a form of heresy, that is, dissent from the established religion. Despite the attempts of some early common law lawyers to distinguish between cases involving heresy and cases involving blasphemy (See Cobbett, *Parliamentary History of England*

were regarded as of a piece; all of them plunged the secular court into difficult theological disputation; all of them were conceived in an effort to preserve inviolate the dogmas of established religion; and all of them—but for the fusion of the Anglican Church with the monarchy of England—would have been excluded from the common law.*

Not until 1676, did there appear the first reported instance at common law in which the words complained of were alleged by the prosecution to be blasphemous and were explicitly declared by the court to be blasphemous.

(1808-20), xvi 325; Odgers, *A Digest of the Law of Libel and Slander* (1911), 486), the common law itself never evolved such a distinction (Nokes, *op. cit. supra* at p. 78). The definitions of blasphemy accepted at the time of the development of the concept as a punishable offense in English courts were sufficiently broad (Lyndwood, *Provinciale* (1679) at 55) to permit heretical offenses to be subsumed under that classification. See, for example Godolphin, *Reportorium Canonicum* (1687) at 560: Lyndwood, *op. cit. supra*, at 295; *Lane's* Case (1631), Reports of Cases in the Courts of Star Chamber and High Commission (C. S. 1886), 188, 190, 193.

* Early intervention by non-religious courts in actions involving blasphemy was wholly administrative. The sole function of the secular arm was that of "policemen—but nothing more." Nokes, *op. cit. supra*, p. 4. Temporal courts operated only to arrest and detain accused persons and to punish those convicted by the ecclesiastical tribunal. Deliberately, common law judges refrained from adjudicating substantive issues involving blasphemy, insisting that these issues remain the exclusive domain of religious authorities. 2 Stephen, *History of Common Law*, 443. This reluctance of the common law to sit in judgment over blasphemous matters, and the identification and equation by the great common law judges of blasphemy and heresy is evident even in the writings of Coke. Although notoriously anxious to enlarge the scope of common law jurisdiction at the expense of spiritual authority, he nevertheless conceded: "And as in temporal causes, the King, by the mouth of the Judges in his courts of Justice doth judge and determine the same by the temporal laws of England: so in causes ecclesiastical and spiritual, as namely, *blasphemy*, apostasy from Christianity, heresies, schisms * * * and others, the same are to be determined and decided by ecclesiastical Judges, according to the King's ecclesiastical laws of this realm * * *" *Caudrey's* case (1590) (emphasis added) 5 Coke at 8b, 9a. See also Coke, Inst. IV, 321.

Taylor's Case, 3 Keb. 607. This case involved John Taylor, a religious maniac, charged with having publicly uttered violently anti-religious remarks. The judgment of the Court, announced by Chief Justice Hale, is especially illuminating:

> "And Hale said, that such kind of wicked blasphemous words were not only an offense to God and Religion, but a crime against the Laws, State and Government, and therefore punishable in this Court. For to say Religion is a Cheat is to absolve all those obligations whereby civil societies are preserved, and that Christianity is a parcel of the laws of England; and therefore to reproach the Christian Religion is to speak in subversion of the law." 3 Keb. 607; 1 Vent. 293.

The Court's opinion clearly discloses that the sole reason for secular judicial intervention was the desire to protect and sustain an established Church as a part of the apparatus of government. "The one point which appears clearly on reading the available material is that Taylor's words were regarded as an attack upon the state." Nokes, *op. cit. supra,* at 53. Hale, speaking for the King's Bench, considered an attack upon Christianity to be an attack upon the State because "Christianity is a pareel of the laws of England."

The political context which evoked this decision and the comparable decision in *Atwood's* Case* is summed up by

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* *Atwood's* Case, Cro. Jac. 421 (ed. of 1638) presented the first prosecution at common law for the expression of offensively religious opinion to be considered by the Court of the King's Bench. Nicholas Atwood in 1617 was charged with having uttered scandalous and irreligious words and also with holding heretical opinion. The decision of the King's Bench affirming Atwood's conviction was predicated upon the finding that his words constituted "Seditious parolls * * * encontre le piece de Relme." From the opinion of the Court, it is evident that Atwood was imprisoned only because the Anglican

Professor Holdsworth in his definitive treatise on the history of English law:

> "During the Tudor period, as in the medieval period, Church and State were regarded from many points of view as a single society which had many common objects, and the two members of that single society were still regarded as bound to give one another assistance in carrying out those common objects. The Church must help the State to maintain its authority and the State must help the Church to punish nonconformists and infidels. The Church was the Church of the State, and membership of it was therefore a condition precedent for full rights in the State. The King was the supreme head of both Church and State, and the law of the Church was the King's ecclesiastical law." Holdsworth, *History of English Law*, Vol. VIII, 403.

Common law emphasis upon the regulation of blasphemy as ancillary to the establishment of religion has persisted even to relatively recent cases. English courts have been forthright in describing blasphemy as a desecration or a showing of disrespect for that sectarian view which is sanctioned by the State and is integrated into the structure of government. *Reg.* v. *Petcherini* (1856) 7 Cox, C. C. (Eng.) 79; *Cowan* v. *Milbourn* (1867) L. R. 2 Exch. (Eng.) 230. The blasphemy statutes were part of a legal system which at that time consistently deprived Jews and other non-conformists of their civil rights. *Regina* v. *Ramsay and Foote*, 15 Cox, C. C. (Eng.) 231 (1883). Inevitably these cases culminated in opinions explicitly

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Church enjoyed official status and protection. Implicit in his remarks were, first, an attack upon the King in his capacity as head of the established religion and, second, an attack upon the entire fabric of law providing for the incorporation of the church into the government. * * * Nokes, *op. cit. supra*, at 25. This was the sole rationale of the Court's opinion. Had there been no consolidation of church and state Atwood would not have been convicted.

reserving the protection afforded by the blasphemy laws exclusively to those doctrinal views which enjoy State endorsement. Thus, in *Gathercole's* case in 1838 (2 Lewin, C. C. (Eng.), 237), Baron Alderson declared:

> "A person may, without being liable to prosecution for it, attack Judaism, or Mohammedism, or even any sect of the Christian religion (save the established religion of the country); and the only reason why the latter is in a different situation from the others is because it is the form established by law, and is therefore a part of the constitution of the country. In like manner, and for the same reason, any general attack on Christianity is the subject of criminal prosecution, because Christianity is the established religion of the country."

Clearly, the whole thrust and intent of the concept of blasphemy was to serve as handmaiden to a religious establishment. For a detailed history of its development see Schroeder, *Constitutional Free Speech Defined and Defended* (1919).

As we show later (*infra* pp. 55-60) Section 122 cannot be defended as an exercise of the state police power. Lacking such justification we must assume that the function of Section 122 is the same as that of the early common law blasphemy decisions—to insure the preferential status of favored religions. In this country, however, such an establishment is expressly barred by the basic law. "We have staked the very existence of our country on the faith that complete separation between state and religion is best for the state and best for religion." *Everson* v. *Board of Education, supra,* 330 U. S. at 59. The very factor which made blasphemy prosecution appropriate, even inevitable, at common law—namely, its usefulness in aiding an establishment of religion—brings it into fundamental collision with American constitutional principle.

(2) *Prohibitions against blasphemy in the United States are inconsonant with First and Fourteenth Amendments.*

Early American decisions rendered before the 14th Amendment was held to make the First Amendment applicable to the states generally upheld the crime of blasphemy as a carry-over from the common law. *Updegraph* v. *The Commonwealth, supra; Commonwealth* v. *Kneeland, supra; People* v. *Ruggles, supra.* In some cases it was additionally required that the statement tend toward a breach of the peace. *State* v. *Chandler,* 2 Harr. (Del.) 553 (1838).

The leading decision in the United States passing upon the constitutionality of state punishment of blasphemy was handed down by Chancellor Kent in *People* v. *Ruggles, supra.* He held (8 Johns. at 293):

> "The reviling is still an offense because it tends to corrupt the morals of the people, and to destroy good order * * *. * * * The people of this State, in common with the people of this country, profess the general doctrines of Christianity * * * and to scandalize the author of these doctrines is not only in a religious point of view, extremely impious, but even in respect of the obligations due to society, in gross violation of decency and good order * * *. Though the constitution has disregarded religious establishments, it does not forbid judicial cognizance of those offenses against religion and morality, which have no reference to any such establishment * * *. This constitutional declaration, noble and magnanimous as it is, never meant to withdraw religion in general and with it the best sanctions of moral and social obligations from all consideration and notice of the law * * *."

Thus, although Chancellor Kent spoke of "judicial cognizance of * * * offenses against religion and morality

which have no reference to * * * establishment," he also indicated that the protection afforded by blasphemy laws was primarily intended for Christianity as the prevailing national religion, professed by the people of the country. In a subsequent portion of his opinion, he made it even more clear that he was preferring one religion over others (8 Johns. at 295):

> "The free, equal and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussion on any religious subject, is granted and secured; but to revile with malicious and blasphemous contempt the religion professed by almost the whole community, is an abuse of that right. Nor are we bound, by any expressions in the constitution, as some have strangely supposed, either not to punish at all, or to punish indiscriminately the like attacks upon the religion of *Mahomet* or of the *Grand Lama*, and for this plain reason, that the case assumes that we are a Christian people, and the morality of the country is deeply ingrafted upon Christianity and not upon the doctrines or worship of those imposters."

The First Amendment, however, was drawn precisely to avoid characterizations of this kind by any agency of government. Preferential consideration of any sect by any court is "establishment" within the meaning of the First Amendment. As this Court has held:

> "The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the vio nce of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to

answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position. *Murdock* v. *Pennsylvania*, 319 U. S. 105, 63 S. Ct. 870, 891, 87 L. Ed. 1292, 146 A.L.R. 81. As stated in *Davis* v. *Beason*, 133 U. S. 333, 342, 10 S. Ct. 299, 300, 33 L. Ed. 637. 'With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with,' See *Prince* v. *Massachusetts*, 321 U. S. 158, 64 S. Ct. 488." *United States* v. *Ballard*, 322 U. S. 78 (1943) at page 87.

We submit that the *Ruggles* case was decided on the basis of principles completely at variance with those applied by this Court in the *Everson*, *McCollum*, and *Ballard* cases. The Fourteenth Amendment had not been adopted and the New York Constitution of 1777, then in effect, contained no express guarantee of freedom of speech or press.* Even prior to the application of the

* Moreover, Kent himself was entirely hostile toward freedom of expression. This is reflected in his remarks in *People* v. *Croswell*, 3 Johns. 337, in which he sharply criticized the Virginia resolution on tolerance adopted in 1800 by the legislature of that state: "Against such an injury upon the freedom of American press I beg leave to enter my protest. The founders of our government were too wise and too just ever to have intended, by the freedom of the press, the

First Amendment to the States at least one court recognized the inaccuracies of the *Ruggles* opinion. In July, 1894, the grand jury of Lexington, Ky., handed down an indictment on a charge of blasphemy. The *Ruggles* decision was relied upon by the prosecution without success. Judge Parker sustained the demurrer to the complaint and explicitly rejected Kent's views:

> "The leading case in this country in which the crime of blasphemy was discussed was that of the People *v.* Ruggles [8 John 290; s. c. 5 Am. Dec. 335] decided by the Supreme Court of New York in 1810, Chief Justice Kent delivering the opinion * * *.
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> "Whilst this opinion did not declare that Christianity was part of the law of the State of New York, but expressly disclaimed that there was an established religion in that state; yet the closeness with which it adhered to the definition of blasphemy as laid down by Blackstone, and the great reliance placed upon the English decisions, make us hesitate to walk in the path trod by Chief Justice Kent himself. For in England there was an established church. * * *
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> "In this country, where the divorce between church and state is complete and final, we should examine with care and accept with caution any law framed and intended for a country where church and state are one. The difficulties in reconciling religious freedom with the right to punish for an offense against any given religion are manifest. From the opinion given in The People *v.* Ruggles, we may deduce as conclusions of the court that the people

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right to circulate falsehood as well as truth * * *." As a delegate to the New York Constitutional Convention in 1831, Chancellor Kent was one of nine who voted against passage of the free speech clause which was adopted by an overwhelming vote. Journal of the New York Constitutional Convention 275-277.

generally in this country are Christians; that Christianity is engrafted upon the morality of the country; * * * that to revile the Christian religion is an offense, but that to revile other religions is not an offense punishable by law * * *.

"Under this Constitution no form of religion can claim to be under the special guardianship of the law. The common law of England, whence our law of blasphemy is derived, did have a certain religion under its guardianship, and this religion was part of the law. * * * The essence of the law against blasphemy was that the offense, like apostasy and heresy, was against religion, and it was to uphold the established church, and not in any sense to maintain good order * * *.

"Blasphemy is a crime growing from the same parent stem as apostasy and heresy. It is one of a class of offenses designed for the same general purpose, the fostering and protecting of a religion accepted by the state as the true religion, whose precepts and tenets it was thought all good subjects should observe. In the code of laws of a country enjoying absolute religious freedom there is no place for the common law crime of blasphemy." (Although not officially reported this opinion is reprinted in the *Truth Seeker's Annual* for 1895, see Schroeder, *Constitutional Free Speech Defined and Defended* (1919), at page 60.)

Recent decisions by this Court plainly call for a re-evaluation at this time of the *Ruggles* and other earlier decisions. Certainly, to whatever extent they relied on the fact that the state is empowered to protect the faith of a majority of its citizens, they are no longer law. We submit that upon such a re-evaluation, it must be held that Section 122 violates the standards laid down in the *Everson* and *McCollum* decisions in that it penalizes "professing

religious beliefs or disbeliefs" and is a law which "aid(s) one religion, aid(s) all religions, or prefer(s) one religion over another".

(3) *Blasphemy laws require active intervention by the state in religious affairs.*

One of the underlying reasons for the adoption of the First Amendment was the fact that any intervention by the State in religious affairs would require it to establish standards as to what was and was not permissible. Thus Madison objected to the Virginia Bill Establishing a Provision for Teachers of the Christian Religion:

> "Because the bill implies, either that the civil magistrate is a competent judge of religious truths—or that he may employ religion as an engine of civil policy. The first is an arrogant pretension, falsified by the contradictory opinions of rulers in all ages, and throughout the world * * *." (Cited in Blau, *op. cit., supra.* p. 115.)

The validity of this view is amply shown here. Since the State has undertaken to suppress pictures because they are sacrilegious or blasphemous, it is required to establish standards by which the picture may be measured. Yet it has failed to do so and that failure was inevitable. Such standards could not be established without violating the First Amendment's injunction against official intervention in religious affairs. In responding to this argument the Court of Appeals held that it is not "true that the Regents must form religious judgments * * * religion [is to be construed] as that word is understood by the ordinary, reasonable person * * *" (R. 154). Nevertheless, expert testimony of religious groups was, in fact, accepted and considered by the Board of Regents (R. 10, 94). Indeed, were such testimony to have been excluded it

might well have amounted to an abuse of discretion as an exclusion of the most competent testimony on matters of sacrilege. Section 122 inescapably forces state agencies into an illegal intrusion into religious question.

Theology was placed by the First Amendment beyond the ken and purview of a secular government. To permit now the publication or showing only of such artistic works of entertainment as successfully pass a state-defined test of religious propriety is not only to enervate our intellectual life and compel the artist to choose between integrity and the right of access to public attention, but, even more dangerous, to embroil government in bitter and unending religious strife. Laws penalizing "sacrilege" violate the express statement of this Court that "the Constitution does not define religion". *Taylor v. U. S.*, 98 U. S. 145.

POINT III

Section 122 of the Education Law cannot be justified as a proper exercise of the State Police Power.

The courts below have attempted to justify Section 122 not as an aid to religion but as a necessary means for the preservation of community order and public peace. It is pertinent to inquire, therefore, in what way the banning of "The Miracle" was in fact related to the preservation of public peace and order. It does not appear from any of the facts in the record that its exhibition would have created an explosive or dangerously tense community situation.*

* The American Civil Liberties Union, vigorously opposed to any form of religious intolerance or persecution, has noticed that a wave of anti-Catholicism appeared in New York *after* spokesmen for the Catholic Church sought to suppress "The Miracle." It discerned no

Prior to action by public officials, exhibition of "The Miracle" produced no hint whatever of public unrest. There was not the slightest breach of decorum on the part of the audience during any of its showings. Even those who are most energetic in urging its suppression have urged only that the film is offensive on doctrinal grounds and have nowhere alleged that there existed any danger of physical violence, rioting or public commotion. Nothing in the tenor or mood of the picture could possibly be conceived as inciting active hostility to any religious groups on the part of the audience.

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anti-Catholicism after "The Miracle" began to play but before any attempts were made to suppress it. We quote here, with permission of COMMONWEAL, a lay Catholic magazine, an exchange of correspondence between its editor and one of the authors of this brief:

March 20, 1951, Herbert Monte Levy, Esq. to COMMONWEAL. "Congratulations for your excellent stand in your editorial of March 2nd against censorship of the film, THE MIRACLE.

"It is encouraging to see that a Catholic publication of your reputation recognizes that a growth of anti-Catholic feeling is one tragic result of the present situation. This is not a strange thing; it happens when any minority group attempts to suppress material unfavorable to it. * * * As a human being, I have been concerned with the encouragement given anti-Catholicism caused by the suppression of THE MIRACLE. Whatever benefit a group may temporarily gain from suppression is completely outweighed by the accelerated schisms created among the public at large. It seems to me that in addition to the fundamental civil liberties arguments against suppression of films, it is within the group's self interest not to engage in activities that engender suppression."

April 11, 1951, John Cogley, Editor, COMMONWEAL, to Herbert Monte Levy, Esq. "Thank you for your recent letter on our 'Miracle' stand. It is encouraging to us to have your support on this question. Of course, as is obvious from what has appeared in our columns, we agree with what you have to say on the question." Both letters are on file at the office of the American Civil Liberties Union, 170 Fifth Avenue, New York, N. Y.

It may be conceded that some persons were deeply offended by the public exhibition of the film but this fact alone cannot serve to silence its sound track. The argument that "sacrilegious" or blasphemous expressions must be outlawed to prevent rioting by those who might feel themselves offended is exceedingly dangerous. This argument could be invoked to justify suppression of any beliefs whenever a dominant majority became sufficiently vociferous to threaten violence to minority creeds. Clearly this is not the intent of the First Amendment. Liberty of religious expression, like liberty of political expression, may not be made contingent upon the sufferance of the majority.

The right to entertain and to voice religious beliefs is a right attaching to the individual conscience, which may not be lightly impaired. For the state to suppress criticism of the viewpoint of any sect, no matter how widespread, because the adherents of that sect threaten violence against their critics is for the state to permit itself to be bludgeoned into the very establishment of religion which the First Amendment forbids.

This Court has been appreciative of the dangers inherent in the suppression of speech as a means of appeasing the threat of violence:

> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and pre-conceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, Chaplinsky *v.* New Hampshire, supra, 315 U. S. at pages 571-572, 62 S.

> Ct. at page 769, 86 L. Ed. 1031, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. See Bridges *v.* California, 314 U. S. 252, 262, 62 S. Ct. 190, 193, 86 L. Ed. 192, 159 A.L.R. 1346; Craig *v.* Harney, 331 U. S. 367, 373, 67 S. Ct. 1249, 1252, 91 L. Ed. 1546. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." *Terminiello* v. *City of Chicago*, 337 U. S. 1, 4-5 (1949).

So long as sacrilegious material is peacefully disseminated the fact that some people opposed to it might cause a disturbance affords no ground for preventing its circulation. *Lynch* v. *City of Muskogee*, 47 F. Supp. 592 (D. C. Okla. 1942); *Oney* v. *Oklahoma City*, 120 F. (2d) 861 (C. C. A. 10th, 1941).

The only ground for limiting speech is the existence of a clear and present danger of a substantial evil that the legislature have the right to prevent. There was no evidence in regard to the existence of a danger to the public present here; the statute is not couched in such terms; there was no such finding. The Court below declared merely that:

> "Insult, mockery, contempt and ridicule can be a deadly form of persecution—often far more so that more direct forms of action. The prohibition of such conduct comes within the legitimate sphere of State action * * *." (R. 155)

But the fact that intemperate attacks *can* be a deadly form of persecution is not a substitute for a finding of clear and

present danger which exists and is not merely a potential possibility. Even under the recent test of the gravity of the evil discounted by its improbability (*Dennis* v. *United States*, 340 U. S. 887 (1950)) the evil is not grave—the only evil is that some may cease to believe in a religious dogma; if this be evil, it is certainly not an evil that the legislature has a right to prevent. The evil that persons possessing certain beliefs will be physically persecuted because of attacks upon the beliefs is so remote as to be non-recognizable. If it be recognizable, then *all* attacks upon *all* beliefs may be prohibited. This is the essence of what the First Amendment was designed to prevent.

We do not mean by this to say that New York is without power to prevent the showing of films which do in fact provoke public disorder. Sections 720 and 722 of the Penal Law of New York are quite sufficient for this purpose,* and they achieve their objectives without necessarily forcing the State into religious controversies in which they have no special competency and constitutionally are required to have no special interest.

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* Section 720 of the Penal Law of New York provides:

"Any person who shall by any offense or disorderly act or language, annoy or interfere with any person in any place or with the passengers of any public stage, railroad car, ferry boat, or other public conveyance, or who shall disturb or offend the occupants of such stage, car, boat or conveyance, by any disorderly act, language or display, although such act, conduct, or display may not amount to an assault or battery shall be deemed guilty of a misdemeanor."

Section 722 of the Penal Law of New York provides:

"Any person who with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior; 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others; * * * 4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd; * * *."

POINT IV

Section 122 of the Education Law is vague, indefinite and ambiguous. It is void for failing to conform to the requirement of due process of law as prescribed by the Fourteenth Amendment.

The legislature has made no attempt to establish a standard under Section 122 of the Education law which is sufficiently definite to support its action. It has used a single word, "sacrilegious." To invoke the statute meaningfully the word must be given some precise meaning which in no way has been defined. We submit, therefore, that Section 122 is void for vagueness. Any statute must be void as a violation of the due process of law prescribed by the Fourteenth Amendment to the United States Constitution when it is so vague that men of common intelligence must necessarily guess at its meaning. *Connally* v. *General Construction Company*, 269 U. S. 385, 391; *U. S.* v. *Cohen Grocery Company*, 255 U. S. 81; *U. S.* v. *Capital Traction Company*, 34 App. D. C. 592. It must convey a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices," or it will fall. *Jordan* v. *DeGeorge*, 341 U. S. 223 (1951). These requirements apply with equal stringency to licensing statutes, *Kunz* v. *New York, supra*.

No hint is given by the legislature in the statute or by the Board of Regents in any regulations as to what constitutes sacrilege.* The opinion of the Appellate Division

Even prior decisions of the state censors upon other motion pictures would be valueless since, according to the Director of the Motion Picture Division of New York State Education Department " * * it is a matter of * * * policy that no action taken in regard to a specific motion picture should be released by the Motion Picture Division." Letter of Hugh M. Flick to Arthur D. Goldstein, Feb. 28, 1952 in ACLU files.

adopted by the Court of Appeals clearly reveals the indefiniteness of the statutory standard. The Appellate Division held that because of varying views of religious experts on this question, "the issue is one of judgment to be resolved by the administrative body * * *" (R. 94). By adopting this decision the Court of Appeals thus takes the position that when the standard is so vague that experts disagree, the only criterion to be employed is the "judgment" of the administrative body. Constitutional rights, however, cannot be restricted by the mere unfettered *ad hoc* judgment of administrative agencies without providing any clear-cut standard to assist in their adjudication. Surely neither administrative agencies nor courts are equipped to grapple with complex religious questions. Still less should the creators of the film be compelled to guide its production by fears of reprisal if their attempt to treat a religious theme be arbitrarily found evil in the eyes of the censor.

The Court below by its reliance upon a dictionary definition to establish the unambiguity of the word "sacrilegious" illustrates instead its vagueness. The Court declared:

> "Only the word 'sacrilegious' is attacked for indefiniteness. *The dictionary, however, furnishes a clear definition* thereof, were it necessary to seek one, as e. g., 'the act of violating or profaning anything sacred' (Funk & Wagnall's New Standard Dictionary, 1937). *There is no difficulty in recognizing the limits of the criterion* thus established, *and the courts have had no problem either with the word 'sacrilegious' or with its synonym, 'profane.'*" (Emphasis supplied.) (R. 151)

It is in order to note that the reason the courts "have had no problem" with the word "sacrilegious" is that,

prior to this case, they have never, so far as we have been able to determine, been called upon to construe it. Nor have the New York courts, so far as we have been able to ascertain, ever construed the word "profane."*

Assuredly, the definition of "sacrilege" offered by the Court of Appeals is no more definite than the statutory ban on any publication "devoted to the publication, and principally made up of criminal news, police reports or accounts of criminal deeds, or pictures or stories of deeds of bloodshed, lust or crime; * * *" struck down by this

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* Precedents in other jurisdictions defining the term "profane" demonstrate that its meaning bears little if indeed any resemblance to the definition of "sacrilege" laid down below.

The common law offense of profanity, or profane swearing consisted of a number of essential elements, and some which were usually, though not always, essential to the criminal offense. It was essential that the swearing constitute a public nuisance (a concept which, if introduced into the area of speech not involving "fighting words," might result in the suppression of all unpopular speech, which always is a nuisance to the public, but protected by the First Amendment). *State* v. *Pepper*, 68 N.C. 243, 12 Am. R. 637 (1872). In order for the swearing to be a public nuisance, it had to be uttered in the presence and hearing of several persons (*State* v. *Pepper, supra*; *Bodenhamer* v. *State*, 60 Ark. 10, 28 S.W. 507; *Gaines* v. *State*, 7 Lea (Tenn.) 410 (1881)), in a public place (*State* v. *Shanks*, 88 Miss. 410; *Republic* v. *Ben*, 10 Hawaii 278 (1896)), and loudly and boisterously enough to annoy the hearers. *Commonwealth* v. *Brown*, 67 Pa. Dist. & Co. 151 (1948); *Commonwealth* v. *Linn*, 158 Pa. 22 (1893). It was usually necessary for the oaths which constitute the offense to be repeated (*Geree* v. *State*, 71 Ala. 7 (1881); *Gaines* v. *State, supra*) although this is not always so if the words used, or the tone or manner or circumstances are such as to make the words a public nuisance, *Young* v. *State*, 10 Lea (Tenn.) 165 (1882). The requirements as to what constitutes "profane" within the meaning of profane swearing varies, but generally, it is required that the words must contain an imprecation of divine vengeance (*Thompson* v. *State*, 34 Ala. App. 608; *Town of Torrington* v. *Taylor*, 137 P. 2d 621 (Wyo. 1943)), divine imprecation (*Duncan* v. *U. S.*, 48 Fed. 128 (CCA Ore.) (1933), cert. denied, 283 U. S. 863), irreverance toward God or holy things, *Town of Torrington* v. *Taylor, supra*, or disrespect or contempt for God's name. *Duncan* v. *U. S. supra*.

Court in *Winters* v. *New York*, 333 U. S. 507 (1947). And certainly Section 122 as interpreted provides no more definite standards than those struck down by this Court in *Kunz, supra*, which made it unlawful publicly to "ridicule or denounce any forms of religious belief, service or reverence, or to preach or expound atheism or agnosticism, or render any pretense therefore * * * *." If anything, the law invalidated in *Kunz* would seem to have been an elucidation of what the legislature means here by "sacrilege". The words at issue in *Kunz* are almost identical with those used by the Court of Appeals below in attempting to render definite the word "sacrilege." Surely, therefore, the vague word "sacrilegious" must fall; neither a court nor the administrative official themselves could here create more definite standards any more than they could in *Kunz*. Indeed, the Court of Appeals below created far more indefinite criteria. The Court approved the suppression of films which are contemptuous of religion "to the extent that it has been here." (R. 154) The addition of these words utterly deprives the standards set out by the Court of any precision or clarity.

Action taken on the basis of a statute so vague both in form and as interpreted is without question void for failing to provide due process of law.

CONCLUSION

The judgment of the Court below should be reversed.

Respectfully submitted,

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The Metropolitan Committee for Religious Liberty is the New York Chapter of Protestants and Other Americans United for the Separation of Church and State whose main objective is the support of the constitutional principle of separation of church and state. The said Committee supports the views set forth in the brief above.

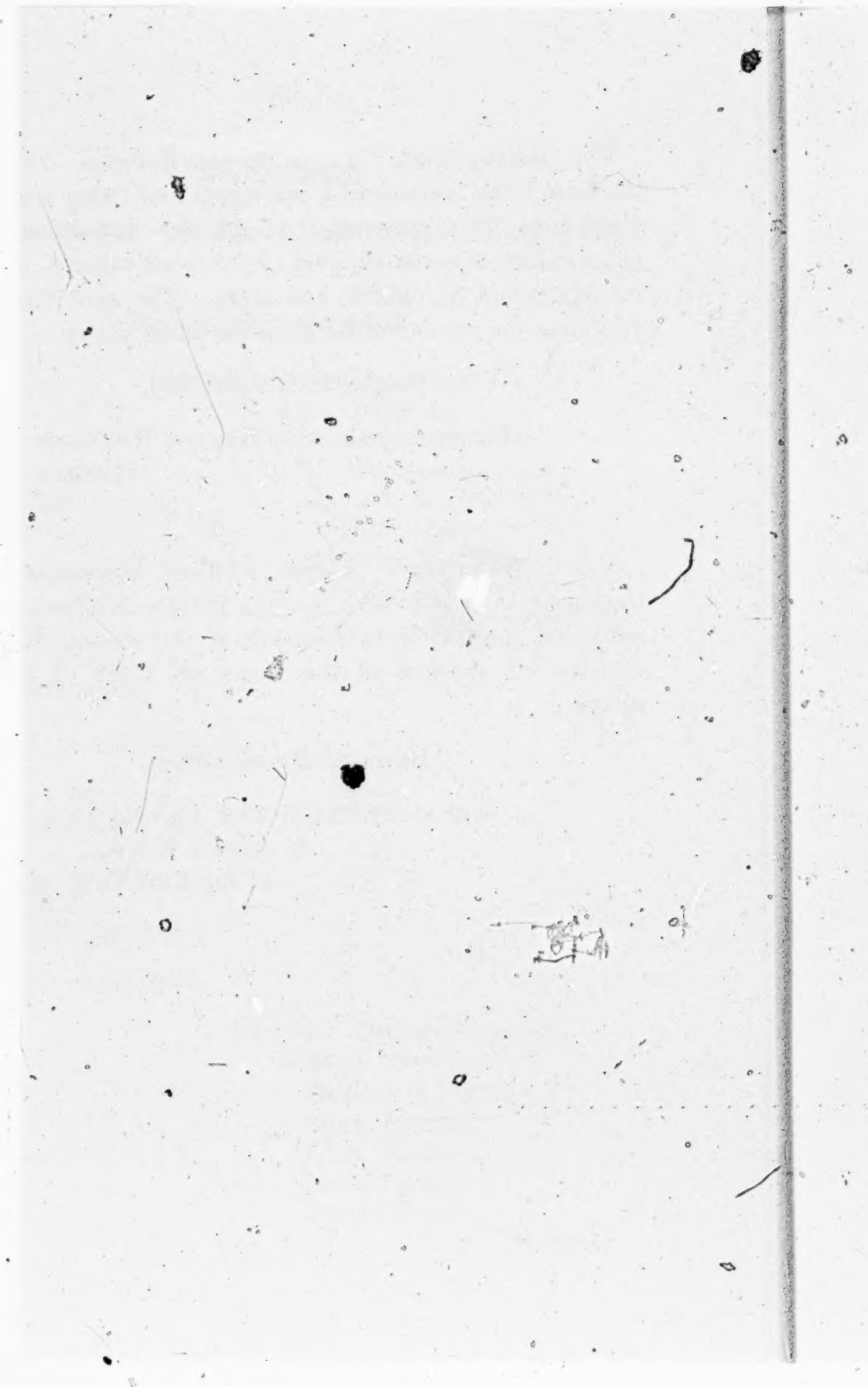
Respectfully submitted,

METROPOLITAN COMMITTEE FOR RELIGIOUS LIBERTY,
HERMAN SEID,
Of Counsel.

The International Motion Picture Organization, an organization of individual motion picture producers, whose principal interest is in freedom of the screen, desires to express its support of the views set forth in the brief above.

Respectfully submitted,

INTERNATIONAL MOTION PICTURE ORGANIZATION,
A. JOSEPH HANDEL,
of the New York Bar,
of Counsel.



APPENDIX I

The Academy Awards

The Award winning picture is listed first. Then the Award winning actress, actor and director.

1928. *Wing* and *Sunrise* (shared). Janet Gaynor, *Seventh Heaven;* Emil Jannings. *The Way of All Flesh.* Frank Borzage, *Seventh Heaven.*

1929. *The Broadway Melody.* Mary Pickford, *Coquette;* Warner Baxter, *In Old Arizona.* Frank Lloyd, *Divine Lady.*

1930. *All Quiet on the Western Front.* Norma Shearer, *The Divorcee;* George Arliss, *Disraeli.* Lewis Milestone, *All Quiet on the Western Front.*

1931. *Cimarron.* Marie Dressler, *Min and Bill;* Lionel Barrymore, *A Free Soul.* Norman Taurog, *Skippy.*

1932. *Grand Hotel.* Helen Hayes, *The Sin of Madelon Claudet;* Frederic March, *Dr. Jekyll and Mr. Hyde.* Frank Borzage, *Bad Girl.*

1933. *Cavalcade.* Katharine Hepburn, *Morning Glory;* Charles Laughton, *Henry VIII.* Frank Lloyd, *Cavalcade.*

1934. *It Happened One Night.* Claudette Colbert and Clark Gable and Director Frank Capra, all for *It Happened One Night.*

1935. *Mutiny on the Bounty.* Bette Davis, *Dangerous;* Victor McLaglen, *The Informer.* John Ford, *The Informer.*

1936. *The Great Ziegfeld.* Luise Rainer, *The Great Ziegfeld;* Paul Muni, *The Story of Louis Pasteur.* Frank Capra, *Mr. Deeds Goes to Town.*

1937. *The Life of Emile Zola.* Luise Rainer, *The Good Earth;* Spencer Tracy, *Captains Courageous.* Leo McCarey, *The Awful Truth.*

1938. *You Can't Take It with You.* Bette Davis, *Jezebel;* Spencer Tracy, *Boys' Town.* Frank Capra, *You Can't Take It with You.*

1939. *Gone with the Wind.* Vivien Leigh, *Gone with the Wind;* Robert Donat, *Goodbye, Mr. Chips;* Victor Fleming, *Gone with the Wind.*

1940. *Rebecca.* Ginger Rogers, *Kitty Foyle;* James Stewart, *The Philadelphia Story.* John Ford, *The Grapes of Wrath.*

1941. *How Green Was My Valley.* Joan Fontaine, *Suspicion;* Gary Cooper, *Sergeant York.* John Ford, *How Green Was My Valley.*

1942. *Mrs. Miniver.* Greer Garson, *Mrs. Miniver;* James Cagney, *Yankee Doodle Dandy.* William Wyler, *Mrs. Miniver.*

1943. *Casablanca.* Jennifer Jones, *The Song of Bernadette;* Paul Lukas, *Watch on the Rhine.* Michael Curtiz, *Casablanca.*

1944. *Going My Way.* Ingrid Bergman, *Gaslight;* Bing Crosby, and Director Leo McCarey, for *Going My Way.*

1945. *The Lost Weekend.* Joan Crawford, *Mildred Pierce;* Ray Milland, and Director Billy Wilder, for *The Lost Weekend.*

1946. *The Best Years of Our Lives.* Olivia De Haviland, *To Each His Own;* Frederic March and Director William Wyler for *The Best Years of Our Lives.*

1947. *Gentlemen's Agreement.* Loretta Young, *The Farmer's Daughter;* Ronald Colman, *A Double Life.* Elia Kazan, *Gentlemen's Agreement.*

1948. *Hamlet.* Jane Wyman, *Johnny Belinda;* Laurence Olivier, *Hamlet.* John Huston, *The Treasure of the Sierra Madre.*

1949. *All the King's Men.* Olivia De Haviland, *The Heiress;* Broderick Crawford, *All the King's Men.* Joseph L. Mankiewicz, *A Letter to Three Wives.*

1950. *All About Eve.* Judy Holliday, *Born Yesterday;* Jose Ferrer, *Cyrano de Bergerac,* Joseph L. Mankiewicz, *All About Eve.*

(The above is republished from page 73 of the February 1952 issue of ***Films in Review.***)

APPENDIX II

Motion Pictures Playing in the Borough of Manhattan, New York City, the week of Feb. 23, 1952, as Reported in CUE (Feb. 23, 1952 issue).

Note: Quotations below, unless otherwise indicated, are from CUE's Feb. 23, 1952 issue. Comments in parentheses are those of the authors of this brief.

A. Motion pictures with social, historical or informational significance.

1. AFRICAN QUEEN, THE. "Superb Technicolor jungle, river, wild animal photography."
2. BAD BOY. ". . . drama of reformation of a delinquent. Set on Variety Club's Texas ranch . . ."
3. BATTLEGROUND. "Stirring, realistic drama based on incident in crucial Battle of Bastogne, World War II."
4. BONNIE PRINCE CHARLIE. ". . . based on Young Pretender's battle for British throne. 1745."
5. BROKEN ARROW. ". . . war and peace in Apache Indian country, 1870's. Authentic background, costumes, native customs, tribal dances, music, etc. . . ."
6. CALL ME MISTER. "They put on an Army Show." (Note: In its original stage version, this show was recognized as a satirical take-off on Army life. Query as to the effect of censorship on changing it to a "typical . . . musical".)
7. CHRISTOPHER COLUMBUS. ". . . Columbus's discovery of New World."
8. COME FILL THE CUP. ". . . drama with alcoholic twist."
9. CRY, THE BELOVED COUNTRY. (A study of South Africa's racial problems.)

10. Death of a Salesman. (Invoives the financial problems of a salesman in our times.)

11. Decision Before Dawn. (Involves the psychological problems of treason.)

12. Destination Tokyo. "Stirring drama of U. S. submarine service in Japanese waters. Authentically reconstructed story . . ."

13. Detective Story. (Involves the problem of police brutality.)

14. Edge of the World. ". . . dramatization of life in the Hebrides Islands . . ."

15. Five Fingers. "Astonishing and thrilling spy melodrama; . . . True Story . . ."

16. Golden Twenties, The. "Prepared by March of Time. Fascinating compilation of newsreels of 1920's."

17. Gunfighter, The. "Absorbing, superbly acted psychological drama. The brief and sudden death of a man who lived and died by the gun."

18. Halls of Montezuma. "Gripping drama of Marine Corps landing in Pacific, World War II. Filmed . . . with cooperation Armed Forces . . . shatteringly realistic . . ."

19. Hurricane Island. "Pretty wild version of how Ponce de Leon discovered Fountain of Youth . . ."

20. In Old Chicago. "Thrilling drama of . . . Chicago Fire."

21. Ivan the Terrible. "Drama of Russia's 16th Century czar."

22. Joan of Arc. ". . . drama of France's 15th century girl savior and saint . . ."

23. Journey Into Light. "Sentimental sob story about a preacher . . ."

24. KNOCK ON ANY DOOR. ". . . drama of a juvenile delinquent and the steps in his criminal career . . ."

25. LOWER DEPTHS. ". . . a powerful social document."

26. MAGIC FACE, THE. "Astonishing mixture of absurdity and seeming truth . . . . story of German actor who murders and impersonates Hitler . . . careful detail 'realism' . . ."

27. MEDIUM, THE. ". . . about a swindling seeress . . ."

28. MIRACLE IN MILAN. ". . . social satire in comic fantasy form . . ."

29. NAVAJO. ". . . . social documentary . . ."

30. NINOTCHKA. "Screamingly funny satirical farce comedy, with Soviet Russia the butt."

31. PASSION FOR LIFE. "Interesting true story recreation of educational problems . . ."

32. QUO VADIS. ". . . about Christian martyrs in mad Emperor Nero's Rome . . . filled with . . . religious fervor . . ."

33. RED BADGE OF COURAGE. "Brilliant and unforgettable drama of a youth who grows into manhood during two days of battle in the Civil War."

34. RETREAT, HELL! "Excellent military 'documentary style' reenactment U. S. Marine training, landing in Korea, fighting and famous 'strategic withdrawal' of December 1950. Authentic, grim, rounded out with combat film taken at the time."

35. RIVER, THE. ". . . picturesque native customs, ceremonies, life on Ganges . . ."

36. ROYAL SCANDAL, A. ". . . . satire on Catherine of Russia and her amours."

37. SWORD IN THE DESERT. "Exciting drama of civil war in Holy Land, between Jewish resistance and British occupation forces."

38. TANKS ARE COMING, THE. ". . . packed with excellent military melodramatics . . . ."

39. THAT HAMILTON WOMAN. ". . . drama of Lord Nelson and his love for Lady Hamilton."

40. THREE CAME HOME. "Absorbing documentary style drama; based on factual story of an American woman's internment in Japanese prison camp."

41. TOMORROW THE WORLD. "Excellent drama based on Broadway play about a Nazi boy in an American home."

42. VIVA ZAPATA. "Large-scale drama of Mexican-revolutionist patriot-hero of 1910, his life and death. Episodic and superficial in its military and political significance (note: other critics disagree); but well-acted, vivid picture of Mexican peon life."

B. The other pictures listed in the said issue of CUE, and not classified in the category above, are listed below.

1. AMERICAN IN PARIS, AN
2. ANGEL IN EXILE
3. ANNE OF THE INDIES
4. ANNIE GET YOUR GUN
5. ASSASSIN FOR HIRE
6. AWFUL TRUTH, THE
7. BABES IN ARMS
8. BALLERINA
9. BIG CAT
10. BRIDE OF THE GORILLA
11. BROWNING VERSION, THE
12. CALLAWAY WENT THATAWAY
13. CALLING BULLDOG DRUMMOND
14. CAPTAIN BOYCOTT
15. CAPTAIN FROM CASTILE
16. CAPTIVE OF BILLY THE KID
17. CASA MANANA
18. CASBAH
19. CLIMAX, THE
20. COBRA STRIKES
21. CROSSWINDS
22. CURTAIN CALL AT CACTUS CREEK
23. DAKOTA
24. DARLING, HOW COULD YOU
25. DAY IN THE COUNTRY
26. DESTINATION UNKNOWN
27. DISTANT DRUMS
28. DOUBLE DEAL
29. DOUBLE DYNAMITE
30. DREAM OF A COSSACK
31. DYNAMITE PASS
32. ELOPEMENT
33. F.B.I. GIRL
34. FAMILY SECRET
35. FANCY PANTS
36. FATHER OF THE BRIDE
37. FLAME OF ARABY
38. FLAME OF NEW ORLEANS
39. GALLOPING MAJOR, THE
40. GIRL IN EVERY PORT

41. GIRL ON THE BRIDGE
42. GOLDEN GIRL
43. GREAT SINNER, THE
44. GREATEST SHOW ON EARTH
45. HATCHET MAN
46. HERE COMES THE GROOM
47. HIGHLY DANGEROUS
48. HOLD THAT GHOST
49. HONEYMOON AHEAD
50. HOTEL SAHARA
51. I'LL NEVER FORGET YOU
52. I'LL SEE YOU IN MY DREAMS
53. IN THE NAVY
54. JOUR DE FETE
55. LADY PAYS OFF
56. LADY POSSESSED
57. LAVENDER HILL MOB
58. LET US LIVE
59. LET'S DANCE
60. LIFE OF RILEY
61. LIGHT TOUCH, THE
62. LONE STAR
63. LOVE NEST
64. LOVERS OF VERONA
65. MAGIC GARDEN, THE
66. MAN-EATER OF KUMAON
67. MAN IN THE DINGHY
68. MAN IN THE SADDLE
69. MAN OF ARAN
70. MAN WITH A CLOAK
71. MARIE DU PORT
72. MASSACRE HILL
73. MEET ME IN ST. LOUIS
74. MR. LORD SAYS NO
75. MR. SOFT TOUCH
76. MODEL & THE MARRIAGE BROKER
77. MY FAVORITE SPY
78. MY FIRST LOVE
79. MY SISTER EILEEN
80. NAUGHTY NINETIES
81. NIGHT IN PARADISE
82. OLIVER TWIST
83. ON THE LOOSE
84. ON THE TOWN
85. PANDORA & THE FLYING DUTCHMAN
86. POOL OF LONDON
87. PURPLE HEART DIARY
88. RASHOMON
89. ROCKY MOUNTAIN
90. SAILOR BEWARE
91. SAVAGE DRUMS
92. SITTING PRETTY
93. SLAUGHTER TRAIL
94. SMALL BACK ROOM
95. SNOW WHITE AND 7 DWARFS
96. SON OF DR. JEKYLL
97. SON OF FRANKENSTEIN
98. STRANGE DOOR, THE
99. STRANGE WOMAN
100. TALES OF HOFFMAN
101. TEN TALL MEN
102. TEXANS NEVER CRY
103. THEY GOT ME COVERED
104. THIS WOMAN IS DANGEROUS
105. THUNDER ON THE HILL
106. TONY DRAWS A HORSE
107. TOP O' THE MORNING
108. TRAIL OF ROBIN HOOD
109. TWO FLAGS WEST
110. TWO GALS & A GUY
111. UNDER THE OLIVE TREE
112. UNKNOWN MAN, THE
113. WEST OF THE PECOS
114. WEST POINT STORY
115. WESTWARD THE WOMEN
116. WHEN MY BABY SMILES AT ME
117. WHEN THE REDSKINS RODE
118. WHEN WORLDS COLLIDE
119. WHIPHAND, THE
120. WINTER MEETING
121. WITHOUT HONOR
122. WOMAN IN QUESTION
123. YOU WERE NEVER LOVELIER
124. YOUR'E IN THE NAVY NOW